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91-269

Supreme Court, U.S.
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No. ....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,
Petitioners,

v.

WILLIAM McKINNEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER, IN THE ABSENCE OF ANY MEDICAL PROBLEMS, A STATE PRISON INMATE STATES AN EIGHTH AMENDMENT CLAIM FOR CRUEL AND UNUSUAL PUNISHMENT BY ALLEGING COMPELLED EXPOSURE TO SECONDARY TOBACCO SMOKE POSES AN UNREASONABLE RISK TO HIS HEALTH; AND WHETHER THE COURT OF APPEALS PROPERLY ADDRESSED THIS ISSUE; AND WHETHER THIS CASE SHOULD BE REMANDED FOR RECONSIDERATION ON THIS ISSUE IN LIGHT OF WILSON V. SEITER.

II. WHETHER THE COURT OF APPEALS IMPROPERLY STATED AN OVERLY BROAD INTERPRETATION OF FEDERAL RULE OF EVIDENCE 706, PERMITTING DISTRICT COURTS TO ALLOCATE THE ENTIRE COST OF COURT-APPOINTED EXPERT WITNESSES TO DEFENDANTS IN ALL CIVIL RIGHTS CASES INVOLVING INDIGENT INMATES.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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*The named petitioners have succeeded Pat Anderson, H. L. Whitley, George Sumner and John Nye, respondents-appellees below, in office. The named petitioners are substituted as parties to this action in accordance with Supreme Court Rule 35(3).

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COME NOW DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J.

ANGELONE, and CHARLES HORN[1], and Frankie Sue Del Papa, the Attorney General of the State of Nevada, and file this petition for writ of certiorari seeking to vacate the Opinion of the Ninth Circuit Court of Appeals.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit was filed on February 1, 1991, and is reproduced in Appendix A. McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991). The Order Entering Judgment in Favor of Defendants which immediately preceded the circuit court litigation is reproduced in Appendix B.

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[1] Petitioner Helling, successor in office to Pat Anderson; petitioner Ignacio, successor in office to Harol Whitley; petitioner Angelone, successor in office to George Sumner; and petitioner Horn, successor in office to John Nye, have been substituted as parties. See Sup. Ct. R. 35(3). William McKinney, respondent in this Court, and petitioner-appellant below, will be referred to as McKinney.

JURISDICTIONAL STATEMENT

This is a civil rights action filed under 42 U.S.C. 1983 in the federal district court. A jury trial was conducted on October 2 and 3, 1989, pursuant to the parties' consent to try the matter before the U.S. Magistrate. Following plaintiff's case in chief, defendants made a motion for a directed verdict which was granted by the U.S. Magistrate. The district court's Order Entering Judgment in Favor of Defendants was entered on October 27, 1989 [Appendix B]. Plaintiff filed his Notice of Appeal from the U.S. Magistrate's Order on October 22, 1989 [Appendix C].

The Opinion of the Ninth Circuit Court of Appeals was filed February 1, 1991 [Appendix A]. Appellees filed a Petition for Rehearing and Suggestion for Rehearing En Banc on March 1, 1991, which was denied by the Court of Appeals on May

14, 1991. This petition for writ of certiorari is being filed within ninety days of the denial of the Petition for Rehearing and Suggestion for Rehearing En Banc. Sup.Ct.R. 13. The jurisdiction of this Court is invoked under section 1254(1) of Title 28 to the United States Code.

STATUTORY PROVISIONS INVOLVED

The following rule and statutory provision are involved in this case: Federal Rule of Evidence 706 and Nevada Revised Statute § 202.2491.

STATEMENT OF THE CASE

Respondent William McKinney (hereinafter "McKinney") filed a civil rights complaint on January 28, 1987, alleging he was subjected to cruel and unusual punishment in violation of the Eighth Amendment, as the result of being involuntarily exposed to other inmates' tobacco smoke. He sought both damages and injunctive relief, claiming his health had been damaged.

The parties filed their proposed joint pretrial order on December 7, 1988, setting forth the agreed-upon issues of law to be tried:

> 1. Have the defendants been deliberately indifferent to the serious medical needs of McKinney, and have they therefore violated his right to be free from cruel and unusual punishment?
>
> 2. Does McKinney have a constitutional right to be housed in a smoke-free environment?
>
> 3. What damages, if any, has McKinney suffered?
>
> 4. Is an award of punitive damages appropriate in this case?
>
> 5. Is McKinney entitled to injunctive relief prohibiting the defendants from housing him in any wing of any unit which also houses smokers?
>
> 6. Are the defendants entitled to good faith immunity? [McKinney objected to the inclusion of this issue]

Following a two day' trial before the U.S. Magistrate, defendants made a motion for a directed verdict at the close of McKinney's case in chief. In the Order Entering Judgment in Favor of Defendants, the U.S. Magistrate found that, as a matter of law, there is no constitutional right to be housed in a smoke-free environment, relying on Gorman v. Moody, 710 F. Supp. 1256 (D. Ind. 1989) and Beeson v. Johnson, 668 F. Supp. 498 (E.D.N.C. 1987).

The U.S. Magistrate also specifically found McKinney had failed to show either a serious medical need or deliberate indifference to it. The standard applied was that set forth in Gorman, citing Simpson v. Broglin, 612 F. Supp. 1162 (N.D.Ind. 1985), which required the plaintiff to show that prison officials intentionally exposed him to a known risk of harm and actually intended to harm him [Appendix B].

On appeal, McKinney raised various

issues which were decided by the Ninth Circuit Court of Appeals. The two issues of relevance to this Petition which were presented to the Ninth Circuit were:

> 1. Whether the U.S. Magistrate Erred in Granting Defendants' Motion for a Directed Verdict on the Issue of Whether McKinney is Entitled to a Smoke-free Environment in Prison.
>
> 2. Whether the Court Should Have Granted McKinney's Motion for a Court-Appointed Expert Under Federal Rule of Evidence 706.

SUMMARY OF THE ARGUMENT

This is an unusual case of national significance which has a far-reaching impact on (1) the cost of operating state correctional facilities; (2) the ability of legislatures and prison administrators to effectively manage state prisons; and (3) the cost to the public of defending against inmate civil rights lawsuits.

The first issue is whether the Ninth Circuit Court of Appeals properly decided McKinney stated a claim for cruel and unusual punishment under the Eighth

Amendment by alleging he had a right to be free from compelled exposure to other inmates' tobacco smoke, notwithstanding McKinney's failure to present evidence of related health problems.

There is a significant split of opinion among the Circuit Courts of Appeals, and in a number of District Courts, on this issue. The major differences focus on the extent to which administrators and state legislatures must have discretion to manage their state prison facilities; the perceived evolving community standards of decency; and whether a potential future risk to an inmate's health falls within the constitutional prohibition against cruel and unusual punishment.

McKinney also appears to be in direct conflict with another recent Ninth Circuit Court of Appeals' case, Johnson v. Moore, No. 89-35867 (filed February

28, 1991; amended April 15, 1991), decided by another three-judge panel, which held that where appellant Johnson had failed to substantiate any health problems and his request not to be housed with a smoker was accommodated, he had failed to show deliberate indifference to serious medical needs under the Estelle v. Gamble standard.

This split among the circuits and within the Ninth Circuit itself must be resolved to provide consistent guidelines for prison authorities, who must contend with limited cell space and a myriad of security and classification concerns. Permitting inmates to prevail in an Eighth Amendment claim on the grounds that exposure to others' tobacco smoke "may" create a possible future health risk effectively takes from prison officials the discretion and flexibility needed to properly and safely classify and house inmates. Compelling prison officials to classify felons according to smoking or non-smoking preference invites serious security, housing and inmate management problems.

The second issue of importance to all state administrators is the Ninth Circuit's holding that Federal Rule of Evidence 706 permits the district court to apportion the entire cost of a court-appointed expert witness to one party. Such a broad interpretation of Rule 706 could have a tremendous adverse impact on the financial resources of every state. Because nearly all inmates filing civil rights lawsuits do so as indigents, and the named defendants are state agencies and employees, then the entire burden of paying for court-appointed expert witnesses will always fall on the state defendants. Without some limitation, this ruling unfairly forces a state into the position of paying for witnesses to help the inmate plaintiff prove his case, no matter how frivolous, against the state.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT ERRED IN HOLDING AN INMATE'S COMPELLED EXPOSURE TO SECONDARY TOBACCO SMOKE POSED A HEALTH RISK FOR WHICH HE COULD STATE A CLAIM FOR CRUEL AND UNUSUAL PUNISHMENT.

A. Two Separate Three-Judge Panels in the Ninth Circuit Have Reached Opposing Conclusions on the Issue of Inmate Exposure to Secondary Tobacco Smoke.

The McKinney opinion was issued February 1, 1991, by Circuit Judges Browning, Pregerson and Trott. On April 15, 1991, another Ninth Circuit panel consisting of Circuit Judges Tang, Nelson and Canby, issued an Order and Amended Opinion in Johnson v. Moore, No. 89-35867, p. 4571 wherein the court held:

> Finally, appellant claims that his exposure to secondhand cigarette smoke constitutes cruel and unusual punishment. Johnson's complaint arose because he was double-celled

> with a smoker. Although Johnson has submitted a great deal of documentation detailing the harmful effects or prolonged inhalation of secondary smoke, his argument for an eighth amendment violation is meritless. Despite a lack of medical substantiation for his claimed allergy, the prison authorities responded to Johnson's request by placing him in a single cell where he would not be exposed to a cellmate's smoking. Accordingly, there has been no showing of "deliberate indifference" to Johnson's needs as is required to establish an eighth amendment violation. See Estelle v. Gamble, 429 U.S. 97, 106 (1976).

Thus, there is no clear guidance from the Ninth Circuit; instead, litigants are faced with two completely different published opinions.

B. The Ninth Circuit as Well as Other Circuits Are Divided on This Issue

1. Ninth Circuit:

Prior to McKinney v. Anderson and Johnson v. Moore, the Ninth Circuit held an inmate with throat cancer stated an Eighth Amendment claim where he alleged his placement in a cell with a smoker endangered his health. Franklin v.

State, 662 F.2d 1337, 1347 (9th Cir. 1981):

> If these conditions, however, were as threatening to Franklin's health as he alleged and if they were the result of deliberate indifference on the part of the prison officials, then Franklin arguably has alleged cruel and unusual punishment under the Eighth Amendment.

2. Tenth Circuit:

a. In Kensell v. State of Oklahoma, 716 F.2d 1350, 1351 (10th Cir. 1983), the court rejected a state employee's claim he had a right to a smoke-free working environment:

> The intrusions upon the plaintiff's person resulting from working with fellow servants who smoke is a far cry from forcible injections of mind altering drugs and assaults committed by police or prison officials to intimidate or punish persons in their custody. This is not a case in which governmental officers are abusing power they possess only because the government is sovereign...the United States Constitution does not empower the federal judiciary, upon the plaintiff's application, to impose no-smoking rules in the plaintiff's workplace. To do so would support the most extreme expectations of the critics who fear the federal

> judiciary as a superlegislature promulgating social change under the guise of securing constitutional rights...

b. On November 14, 1990, the Tenth Circuit granted a rehearing and rehearing en banc in Clemmons v. Bohannon, 918 F.2d 858 (10th Cir. 1990). Oral argument was heard in early 1991, but to date no decision has been released. The Clemmons court, prior to the en banc rehearing, had held an inmate without specific health problems stated an Eighth Amendment claim by alleging his exposure to secondary tobacco smoke created an unreasonable risk to his health. The Court stated at p. 869:

> Kensell is distinguishable, however. Here, Clemmons faces exposure to ETS in extremely close quarters in his prison setting. Unlike the plaintiff in Kensell, Clemmons has no option to quit or transfer. Significantly, moreover, Kensell was decided well before the Surgeon General published his 1986 findings concerning the hazards of ETS, and predates other significant government action taken in response to the discoveries of the harmful

effects of ETS...

Judge Tacha filed a strong dissent in Clemmons, stating he could

> . . . find no basis in eighth amendment jurisprudence for forcing on prison officials, . . . a constitutionally-mandated health standard that is as yet not enjoyed by those persons living and working outside the prison walls. I find that the majority's effort to engraft a constitutional dimension onto this controversial societal issue constitutes a challenge to the basic purpose of the eighth amendment and the proper role of federal judiciary. . . .

Clemmons, at 870.

Judge Tacha concluded that "[A] constitutional right to a smoke-free cell would have no limits and it would open a Pandora's box of constitutional challenges for prison administrators," and there is

> . . . no justification whatsoever for making the rights of non-smoking prisoners paramount over the myriad of health and security concerns that prison officials must confront and balance daily. At worst, the majority opinion lays the groundwork for a constitutional burden that will be impossible for prison

> authorities to carry, ... At best, the majority imposes an unwarranted and unprecedented constraint on the discretion of prison administrators to balance potential versus immediate health and safety concerns.

Clemmons, at 873.

3. Fifth Circuit:

In Wilson v. Lynaugh, 878 F.2d 846 (5th Cir. 1989), the court declined to consider appellant's previously litigated Eighth Amendment claim based on new studies regarding environmental tobacco smoke. The Wilson court cited with approval from Gorman v. Moody:

> "'it is also relevant to our Eighth Amendment analysis that 'society cannot yet completely agree on the propriety of nonsmoking areas and a smoke-free environment.'"

C. United States District Court Cases.

1. The U.S. District Court for the Northern District of Indiana held, in Gorman v. Moody, 710 F.Supp. 1256, 1262 (N.D. Ind. 1989), that where a plaintiff did not allege a serious medical

condition exacerbated by exposure to tobacco smoke, no Eighth Amendment claim is stated.

> This court believes that smoking is a societal issue best resolved by the executive and legislative branches of government. The operation of our correctional facilities "is peculiarly the province of the legislative and executive branches of our government, not the judicial." [citations omitted]...Whether to provide smoke-free areas must be left to the discretion of legislatures and prison officials who must operate the prisons to the best of their abilities, and those officials must make those decisions after a consideration of all factors relevant to the particular institution and the care and well-being of all inmates.

2. The U.S. District Court for the Eastern District of North Carolina decided Beeson v. Johnson, 668 F.Supp. 498 (E.D.N.C. 1987), which involved an inmate with asthma and respiratory problems who complained of exposure to heavy secondary cigarette smoke despite the prison doctor's indication he should be in a non-smoking area. The court held

that in these circumstances, plaintiff could state an Eighth Amendment claim.

3. The U.S. District Court for the District of New Hampshire, in Avery v. Powell, 695 F.Supp. 632, 639 (D.N.H. 1988), held that

> exposure to ETS is not merely discomforting and that conditions of plaintiff's confinement may constitute punishment cognizable under the Eighth Amendment.

In addition, the Avery court held:

> the decision by defendants to maintain plaintiff in a dangerous [non-smoke-free] environment may be construed as a deliberate decision which is not reasonably related to any proper governmental objective, and thus it may deprive plaintiff of his liberty rights without due process. Accordingly, plaintiff states a claim under the Fourteenth Amendment...

4. In Caldwell v. Quinlan, 729 F.Supp. 5 (D.D.C. 1989), the U.S. District Court for the District of Columbia granted the Director of the Federal Bureau of Prisons' motion to dismiss a lawsuit brought by an inmate

claiming the Bureau's failure to protect him from secondary tobacco smoke or keep him constantly segregated from smokers violated his Eighth Amendment rights:

> This Court is unable to find that defendant's smoking policy involves a protected liberty interest. Individuals do not have a constitutional right to be free from passive smoke [citations omitted]. Nor does the Bureau of Prisons' smoking policy somehow create a liberty interest to a smoke-free prison term. It provides only that a Warden may implement a smoking policy at his discretion...
>
> The Constitution does not mandate comfortable prisons, and prisons which house persons convicted of serious crimes cannot be free of discomfort.

5. In Lee v. Carlson, 645 F.Supp. 1430, 1438 (S.D.N.Y. 1986), the Court held an inmate did not state an Eighth Amendment claim for failure to keep him from being exposed to tobacco smoke

> ...because there is no allegation in the complaint, and nothing in the record, to indicate that plaintiff was being exposed to smoke in violation of any then existing statute or regulation, or that any

> of the other defendants acted unreasonably under the circumstances in exposing plaintiff to tobacco smoke.

6. The Court in West v. Wright, 747 F.Supp. 329, 332 (E.D.Va. 1990), considered an inmate's claim that failure to put him in a smoke-free single cell constituted deliberate indifference to his serious medical needs:

> Here, the Court concludes only that where plaintiff does not suffer from any preexisting medical condition that is aggravated by environmental tobacco smoke, and where defendants have implemented significant safeguards to protect nonsmokers from environmental tobacco smoke, the factual circumstances do not support a claim of cruel and unusual punishment.

D. The Court Erred in Deciding What it Perceived to be the Evolving Standards of Decency

The Ninth Circuit supported its decision with reports from the Surgeon General and Environmental Protection Agency regarding the association between environmental tobacco smoke and lung cancer, and noted a number of prisons and jails were "beginning to take steps to restrict or ban smoking."

The Ninth Circuit also cited numerous state statutes regulating smoking in public buildings, and specifically referred to Nevada Revised Statute §202.249.

The court, however, did not appear to take into account that a number of states specifically exempt prison facilities from smoking regulations. As recently as July 3, 1991, the Governor of the State of Nevada signed into law Assembly Bill 597, which clarifies that facilities used to house or serve inmates are not subject to Nev.Rev.Stat. §202.249 [reproduced as Appendix D].

This is the community standard in the State of Nevada with respect to the application of its laws restricting smoking in public buildings. Like Nevada, there are a number of other states with statutes regulating smoking in public buildings which specifically exempt correctional facilities.

Still other states' restrictions on smoking are limited to areas open to the public, which also does not include inmate housing. As Judge Tacha stated in his dissent in Clemmons v. Bohannan, supra, at p. 872, "a review of the state legislation cited by the majority as forbidding or restricting smoking reveals that the vast majority of these laws are limited to public places, which are statutorily defined so as to exclude prisons."

Consequently, although the trend in society is toward the protection of the rights of non-smokers in public places, such protections have not been extended to prisons in deference to the unique problems associated with housing inmates. Petitioners submit this is the community standard of decency which should have been recognized by the Ninth Circuit.

E. The Eighth Amendment Claim as Determined by the Court Was Not the Issue on Appeal and Should Not Have Been Decided in the Absence of Briefing by the Parties

In granting defendants' motion for a directed verdict against McKinney, the U.S. Magistrate found that

> McKinney failed to produce any evidence to support his claim that the defendants were deliberately indifferent to his serious medical symptoms... [and] as a matter of law, McKinney had no constitutional right to be free of secondary cigarette smoke. (Opinion, at p. 3, Appendix B).

The Ninth Circuit panel stated:

> The magistrate framed the issue in all-or-nothing terms: either McKinney had a constitutional right to a completely smoke-free environment, or he had only a constitutional right to medical attention for proven serious medical needs. By so doing, the magistrate excluded a valid eighth amendment claim lying between those two extremes: that compelled exposure to levels of ETS that pose an unreasonable risk of harm to human health constitutes cruel and unusual punishment. (Opinion, at p.3, Appendix B).

First, the magistrate did not frame the issues to be tried. The parties themselves determined the issues in their proposed joint pre-trial order, which were whether, under the Eighth Amendment, defendants had been deliberately indifferent to McKinney's serious medical needs, and whether McKinney had a constitutional right to be housed in a smoke-free environment. Thus, the magistrate merely ruled on the issues which the parties had agreed to try.

The question on appeal was not whether McKinney's constitutional rights had been violated by compelled exposure to secondary tobacco smoke, but rather was whether the magistrate abused her discretion in granting the defendants' motion for a directed verdict. The motion, of course, addressed the issues being tried pursuant to the pre-trial order.

It was inappropriate for the Court of Appeals to consider an issue not tried, nor raised on appeal, nor briefed by the parties. As stated in Matter of Texas Mortgage Services Corporation, 761 F.2d 1068, 1073 (5th Cir. 1985),

> Rule 28(a)(4) has been construed as a mandate that the brief of the appellant contain a statement of the issues presented for review, and an argument portion which analyzes and supports those contentions. 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure, §3974, at 421 (1977). As a consequence, it has been stated that issues "not raised or argued in the brief of the appellant may be considered waived and thus will not be noticed or entertained by the court of appeals. Id. at 421 n. 1.

In F&H Inv. Co. v. Sackman-Gilliland Corp., 728 F.2d 1050 (8th Cir. 1984), the court declined to reach an issue neither briefed nor discussed at oral argument by either party:

> Due to plaintiff's notice of appeal and the other indications discussed above, this appeal was briefed and argued on the assumption that plaintiff did not appeal the grant of judgment notwithstanding the

> verdict on the breach of fiduciary duty claim. For this court to reach the issue would prejudice defendant. Therefore, we find that the issue has not been preserved for appeal. See Fed.R.App.P. 3(c), 9 Moore's Federal Practice §203.18 (2 Ed. 1983). (Emphasis added).

The Ninth Circuit should not have decided the Eighth Amendment issue in a vacuum, and at the very least should have asked the parties to submit additional briefing on the point. Then, Petitioners could have provided evidence of the difficulties in classifying and housing inmates within the limitations of budget, facilities, and security concerns. Petitioners could have advised the court of the accommodations which are made for both smoking and non-smoking inmates.

F. Alternatively, McKinney Should be Remanded to the Ninth Circuit for Reconsideration in Light of this Court's Decision in Wilson v. Seiter.

1. The Subjective "Deliberate Indifference" Requirement Was Not Met by McKinney.

This Court issued its opinion in

Wilson v. Seiter, No. 89-7376 on June 17, 1991, holding that an inmate challenging the conditions of his confinement as cruel and unusual punishment must show prison officials acted with deliberate indifference.

> Having determined that Eighth Amendment claims based on official conduct that does not purport to be the penalty formally imposed for a crime require inquiry into state of mind, it remains for us to consider what state of mind applies in cases challenging prison conditions...

Wilson, at p. 7.

> "Whether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in Estelle." [quoting from LaFaut v. Smith, 834 F.2d 389, 391-392 (CA4 1987).

Wilson, at p. 9.

In the Order Entering Judgment in Favor of Defendants [Appendix B], the U.S. Magistrate specifically stated:

> Based upon the testimony adduced by McKinney during his presentation of

> his case, he has failed to show either a serious medical need or deliberate indifference to it... (Order, at p. 4).
>
> There was no evidence presented of personal involvement by any of the Defendants, nor in accordance with the test announced in Beeson above, was there any indication that any of the Defendants intentionally chose to inflict harm upon the Plaintiff. (Order, at p. 6).

Without a showing by McKinney of any personal involvement or deliberate conduct on the part of Petitioners, he cannot prevail on his Eighth Amendment claim.

2. The Objective Component of the Eighth Amendment Claim Was Not Met by McKinney

The Wilson court also stated, at p. 3:

> The Constitution, we said "does not mandate comfortable prisons,"*id*., at 349, and only those deprivations denying "the minimal civilized measure of life's necessities," *id*., at 347, are sufficiently grave to form the basis of an Eighth Amendment violation. [quoting from Estelle v. Gamble, 429 U.S. 97 (1976).

Petitioners submit the Eighth Amendment prohibition against cruel and unusual punishment does not embrace the concept of an environment in prison which is free from varying levels of secondary tobacco smoke. Such an environment does not exist in the real world, save for those exceptions primarily carved out by state legislatures which are generally applicable to certain buildings open to and used by the general public. McKinney is not entitled to a prison cell meeting his standards of comfort, and his occasional exposure to secondary tobacco smoke does not deprive him of "the minimal civilized measure of life's necessities."

The mere existence of a potential health risk does not constitute cruel and unusual punishment. If it did, then inmates would be filing civil rights complaints every time they were exposed to another inmate with a cold. The Ninth Circuit stated on p. 14 of its Opinion

[Appendix A]:

> "while not every deviation from ideally safe conditions may amount to a constitutional violation, we ruled [in Hoptowit v. Spellman] that conditions of confinement that seriously threaten the health and safety of the inmates are unconstitutional."

Yet McKinney made no showing to the U.S. Magistrate that his health or safety had been seriously threatened by exposure to secondary tobacco smoke. Surely, the circuit court acted with undue haste in ruling for McKinney when the defendants had not even presented their own evidence to contest Mckinney's legally insufficient facts. In the absence of any compelling evidence subjected to an evidentiary contest, McKinney has not stated, much less proven an Eighth Amendment claim.

II. THE NINTH CIRCUIT'S INTERPRETATION OF FEDERAL RULE OF EVIDENCE 706 WAS OVERLY BROAD. WHERE A COURT-APPOINTED EXPERT IS REQUIRED UNDER THE RULE, THE RULING WILL UNFAIRLY PLACE THE FULL FINANCIAL BURDEN ON STATE DEFENDANTS IN SECTION 1983

ACTIONS.

Prior to trial, McKinney, a life term murderer, submitted a Motion for Subpoena to Produce an Expert Witness at Trial and accompanying Affidavit [Appendix E], stating he needed certain "experts" to help prove that his exposure to inmates who smoke had caused his voice to change to the extent he was unable to sing the lyrics to the song he wrote, and he "could have made a profitable career out of his song writing talent had he not been forced to live in close quarters with a heavy smoker." He requested subpoenas be issued for (a) the Surgeon General, (b) a representative from Action on Smoking & Health, (c) a representative from the National Interagency Council on Smoking & Health, and (d) a representative from the Food & Drug Administration.

The U.S. Magistrate denied the

motion, stating in part:

> "Apparently plaintiff intends for the court to locate and procure one or more of these officials to provide testimony for him...he has not provided any information on where such individuals may be found or cited authority to show the court has jurisdiction to take such action. He does not indicate he has communicated with any such person...
>
> "The choosing and obtaining of witnesses for a party is that party's responsibility and in a civil case the paying of witness fees, transportation costs and the like also become that party's responsibility and not the court's or the opposing party's duty...further, a subpoena for a hearing or trial must be served within the district or...within 100 miles of the place of the hearing or trial...The court suspects these persons may be outside that area...

(Order dated April 8, 1988 reproduced as Appendix F).

McKinney then filed a Motion for Court Appointed Expert Witness (reproduced as Appendix G), stating in part the

> "testimony of an environmental toxicologist is absolute (sic) necessary to clarify the facts in this case for a jury" [and] "without

> the testimony of an environmental toxicologist plaintiff cannot prove the affect (sic) of a smokers sidestream smoke upon a nonsmoker."

The Court denied McKinney's motion, based in part upon its finding McKinney was asking the Court to appoint and pay for an expert witness to assist him with his case [Appendix H]. The Court stated the purpose of a court-appointed expert under FRE 706:

> Such appointments are not for the benefit of a particular party. Moreover, court appointed experts do not become the representatives on behalf of a particular party. Such experts serve as an independent source of assistance to the court, and from whom the parties may learn of his or her findings.
>
> Rule 706...permits a court to appoint its own witness, not to undertake to pay the fees for a party's expert witness. In fact, subsection (b) provides that the compensation for such expert "is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the Fifth Amendment."...In all other cases the parties themselves pay for the appointment of the court's expert...

However, on appeal the Ninth Circuit concluded:

> The magistrate then ruled that no expert may be appointed in the present case because McKinney, who proceeded in forma pauperis, would be unable to pay his proportion of the fees. The magistrate interpreted Rule 706(b) as allowing court-appointed experts only when both sides are able to pay their respective shares. (Opinion at p. 23, Appendix A).

Petitioners submit the Ninth Circuit's interpretation of the Magistrate's rationale is in error. The U.S. Magistrate did not deny McKinney's motion because he was indigent, but because he wanted the court to pay for his witnesses by designating them as court-appointed experts. The U.S. Magistrate was fully cognizant of her power to do so, but clearly decided that in this case, it would not be appropriate.

The Ninth Circuit Court further stated:

> We believe that the magistrate's ruling was based upon an unduly restrictive reading of the rule..."Rule 706...allows the court to assess the cost of the expert's compensation as it deems appropriate." We believe that the phrase "such proportion as the court directs," in an appropriate case, permits the district court to apportion all the cost to one side. Otherwise, we are faced with an inflexible rule that would prevent the district court from appointing an expert witness whenever one of the parties in an action is indigent, even when the expert would significantly help the court. (Opinion at p. 23, Appendix A).

The full text of FRE Rule 706 is reproduced as Appendix I. Section (b) of that rule states:

> (b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

There appears to be very little case

law on this subject. In Webster v. Sowders, 846 F.2d 1032, 1038 (6th Cir. 1988), the court held that a "District Court has authority to apportion costs under this rule, including excusing impecunious parties from their share." However, in that case, the indigent plaintiff's motion for a preliminary injunction had been granted and in that process the court made a prior determination that plaintiff had demonstrated his case had merit. The court also determined it would benefit from the independent views of an expert in the field of asbestos.

In United States Marshals Service v. Means, 741 F.2d 1053, 1059 (8th Cir. 1984), the court held:

> ...where the United States brings an action and its opposition lacks funds to present indispensable defense testimony, the government plaintiff may, under the limited circumstances presented in this case, be required by the district court to advance expenses for these

> witnesses subject to a final award of costs to the prevailing party at the conclusion of the litigation.

The Court further clarified this would apply only where the witnesses were called by the court, not the parties, and only "under compelling circumstances." Such circumstances existed where (a) the United States had brought suit against indigents, (b) the United States had paid the indigents' witnesses' fees and costs on prior occasions, (c) during midtrial the United States refused to pay as it had in the past, (d) the court considered these particular witnesses essential to a fair trial.

In the McKinney case, the U.S. Magistrate specifically found McKinney wanted the court to appoint witnesses under FRE 706, for his benefit, not the court's.

Where inmate civil rights litigation is concerned, the state and its officials/employees are always the defendants, and the inmate is nearly always indigent. The states do not have unlimited financial resources to pay the expert witness fees for the thousands of Section 1983 lawsuits filed each year by inmates, most of which are frivolous. It is of no help to the state to be able to tax costs against the losing inmate, since recovery of such costs would be highly unlikely.

The Ninth Circuit's broad interpretation of FRE 706(b) is an open-ended invitation to inmates to inundate the district courts with motions for court-appointed expert witnesses at the states' expense.

Petitioners respectfully request this Court adopt a much more restrictive reading of FRE 706(b), to prevent abuse of this rule and protect the public from bearing the entire cost of all inmate civil rights litigation, whether meritorious or frivolous.

CONCLUSION

For the reasons discussed above, the State respectfully requests this Court grant certiorari, receive briefs on the merits, and ultimately vacate the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted.

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APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM MCKINNEY,)
)
Plaintiff-Appellant,)
) No. 89-16589
vs.) D.C. No.
PAT ANDERSON; CAROL) CV-N-87-36-ECR
PLOYHAR; H.L. WHITLEY;)
GEORGE W. SUMNER;) OPINION
JOHN NYE,)
)
Defendants-Appellees.)
)

Appeal from the United States District
Court for the District of Nevada
Edward C. Reed,
District Judge, Presiding

Submitted November 6, 1990*
San Francisco, California

Filed February 1, 1991

Opinion by Judge Harry Pregerson

Before: BROWNING, PREGERSON, and
TROTT, Circuit Judges

HARRY PREGERSON, Circuit Judge:

William McKinney, a prisoner in Nevada state prison in Carson City, filed a pro se civil rights complaint in United States District Court under 42 U.S.C. § 1983. McKinney, a non-smoke, alleged that he is almost constantly exposed to secondary cigarette smoke, also known as environmental tobacco smoke (ETS), because he is housed with a heavy smoker and there are no restrictions on smoking in the prison. McKinney complained that the exposure to ETS caused him nosebleeds, headaches, chest pains, and loss of energy. McKinney stated that the prison officials repeatedly denied his requests to be transferred to a single room or to be housed with a non-smoker.

McKinney asserts two distinct Eighth Amendment claims. First, he alleged that prison officials were deliberately indifferent to his serious existing medical symptoms, which he asserts were caused by exposure to ETS. Second, he asserts that his exposure to ETS constitutes cruel and unusual punishment. McKinney also asserts that prison officials denied him due process of law by their refusal to apply a Nevada anti-smoking statute to the prison library. McKinney sought damages and injunctive relief to remedy the alleged violations of his constitutional rights.

Individuals named as defendants are George Sumner, the director of the prison; H.L. Whitley, the warden; Pat Anderson, the associate warden; Carol Ployhar, a unit counselor; and John Nye, the store manager at the prison.[1] All are employees of the Nevada Department of Prisons.

All proceedings in this action were conducted before a magistrate. Pursuant to Fed. R. Civ. P. 65, she consolidated McKinney's motion for preliminary injunctive relief with the trial on the merits. The magistrate also denied McKinney's motion to appoint an expert to testify about the health effects of ETS, and granted the defendants' motion in limine narrowing the issues to be tried.

The court allowed McKinney to proceed on two issues: whether he had a constitutional right to be housed in a smoke-free environment, and whether defendants were indifferent to his serious medical needs. Both before and during trial, McKinney sought to litigate the degree of his exposure to ETS and the actual and potential effects of such exposure on his health. The magistrate, however, excluded evidence that did not relate to McKinney's current medical symptoms, including documentation of the potential health effects of exposure to ETS.

After McKinney presented his

evidence to a jury, the defendants moved for a directed verdict on the ground that McKinney failed to produce any evidence to support his claim that the defendants were deliberately indifferent to his serious medical symptoms. The magistrate granted the motion. The district court found that, as a matter of law, McKinney had no constitutional right to be free of secondary cigarette smoke. The magistrate framed the issue in all-or-nothing terms: either McKinney had a constitutional right to a completely smoke-free environment, or he had only a constitutional right to medical attention for proven serious medical needs. By so doing, the magistrate excluded a valid eighth amendment claim lying between these two extremes: that compelled exposure to levels of ETS that pose an unreasonable risk of harm to human health constitutes cruel and unusual punishment.

McKinney filed a notice of appeal[2] and requested that the government provide him with a transcript of the trial. The magistrate denied this request.

On appeal, McKinney raises the following arguments:

(1) that the magistrate erred in holding that, as a matter of law, compelled exposure to ETS does not violate a prisoner's constitutional rights;

(2) that the magistrate erred in holding that the Nevada anti-smoking statute does not apply to state prison libraries;

(3) that the magistrate erred in refusing to appoint an expert witness to testify about the health effects of exposure to ETS;

(4) that the magistrate erred in entering a directed verdict in favor of the defendants on the claim of deliberate

indifference to serious medical symptoms; and

(5) that the magistrate erred in denying McKinney's request for production of a trial transcript at government expense.

DISCUSSION

A. Does a Prisoner Have a Constitutional Right to Be Free of Exposure to Levels of ETS that Pose an Unreasonable Risk of Harm to His Health?

In her order granting defendants' motion for a directed verdict, the magistrate declared that there is no constitutional right for an inmate to be free from secondary cigarette smoke. The magistrate ruled that a prisoner can show a constitutional violation from involuntary exposure to ETS only by proving that the state was deliberately indifferent to his serious, immediate medical symptoms. We disagree. For the reasons that follow, we conclude that, even if an inmate cannot show that he suffers from serious, immediate medical symptoms caused by exposure to ETS, compelled exposure to ETS is nonetheless cruel and unusual punishment if it is at such levels and under such circumstances as to pose an unreasonable risk of harm to an inmate's health.

It is unquestioned that the Eighth Amendment's bar on cruel and unusual punishments proscribes more than just barbarous physical punishments. Estelle v. Gamble, 429 U.S. 97, 102 (1976). The Eighth Amendment prohibits penalties that transgress today's "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ." Id. (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir, 1968)). It is also undisputed that the conditions of confinement in a prison are subject to scrutiny under Eighth Amendment standards. Hutto v. Finney, 437 U.S. 678, 685 (1978). When the state takes a person into its custody, who by reason of the deprivation of his liberty cannot care for himself, the Constitution imposes upon the state a corresponding duty to assume responsibility for the prisoner's safety and well-being. Estelle, 429 U.S. at 103-104; Hoptowit v. Spellman, 753 F.2d 779, 784 (9th Cir. 1985).

The Supreme Court in Rhodes v. Chapman, 452 U.S. 337 (1981), discussed the standard by which courts must examine an Eighth Amendment claim:

> No static "test" can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." The Court has held, however, that "Eighth Amendment judgments should neither be nor appear to be merely the subjective views" of judges. To be sure, "the

> Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability" of a given punishment. But such "'judgment[s] should be informed by objective factors to the maximum possible extent.'"

Id. at 346 (citations omitted). We must therefore determine, judging by objective factors and measured against our society's evolving standards of decency, whether it is cruel and unusual punishment to confine an inmate in a prison where he is exposed to levels of ETS that pose an unreasonable risk of harm to his health.

In this circuit, it is established that exposure to ETS by people who are sensitive to ETS because of pre-existing conditions may constitute cruel and unusual punishment. In Franklin v. State of Oregon, 662 F.2d 1337, 1346-47 (9th Cir. 1981), we held that housing an inmate suffering from throat cancer with a smoker may violate the Eighth

Amendment. We have not examined the question whether an inmate who is not suffering from a pre-existing condition may state a valid cause of action under the Eight Amendment by alleging that continual involuntary exposure to ETS poses an unreasonable risk of harm to his health.

In Avery v. Powell, 695 F. Supp. 632 (D.N.H. 1988), the district court declined to dismiss an Eighth Amendment claim based on exposure to ETS. The court first determined that, because widely accepted scientific evidence shows that ETS poses health hazards, unwanted exposure to ETS may be a punishment within the meaning of the Eighth Amendment. Id. at 639. The court then ruled that our society's attitudes have evolved to the point that unwanted exposure to ETS may amount to a violation of "society's evolving standards of decency." Id. at 639-40. The court noted that, as of 1987, forty-five states and the District of Columbia had enacted laws restricting smoking. Id. at 640. In addition, the court noted that the federal government has enacted laws and regulations aimed at reducing involuntary exposure to ETS on common carriers and in buildings that the government controls and operates, including federal prisons. Id.

In Clemmons v. Bohannon, 918 F.2d 858, reh'g en banc granted, ____ F.2d ____, 1990 U.S. App. LEXIS 20375 (10th Cir. 1990), the Tenth Circuit agreed with Avery in holding that indefinite double-celling of smokers with nonsmokers against their expressed will can amount to a violation of the Eighth Amendment. The court in Clemmons stated that its ruling reflected "a longstanding judicial recognition that exposing a prisoner to an unreasonable risk of a debilitating or terminal disease does indeed offend [the] 'evolving standards of decency.'" 918 F.2d at 864.[3]

We agreed with the reasoning in Avery and Clemmons. The following discussion explains that: (1) scientific evidence has rapidly accumulated in the last few years regarding the adverse health effects resulting from exposure to ETS; (2) the health consequences from exposure to ETS are magnified in prison settings because of the nearly constant exposure of inmates to elevated levels of ETS; (3) we have long recognized that conditions of confinement that threaten inmates' health and safety are unconstitutional; and (4) the attitude of our society has evolved to the point where, today, it indeed violates society's standards of decency to expose an unwilling inmate to levels of ETS that pose an unreasonable risk of harm to human health.

1. Scientific Evidence on ETS

In determining whether conditions of confinement are constitutional, "the court's judgment must be informed by current and enlightened scientific opinion as to the conditions necessary to insure good physical and mental health for prisoners." Spain v. Procunier, 600 F.2d 189, 200 (9th Cir. 1979).

It is beyond dispute that direct ingestion of tobacco smoke is harmful to health. The Surgeon General estimates that smoking is responsible for more than one of every six deaths in the United States.[4] More than 3800 compounds have been identified in cigarette smoke[5] and, of those, forty-three are carcinogenic.[6]

Mainstream cigarette smoke is the smoke that smokers draw directly into their mouths and lungs. Environmental tobacco smoke (ETS) consists of the fraction of mainstream smoke that smokers exhale plus sidestream smoke, which burning cigarettes emit between puffs.[7] The chemical composition and the qualitative toxic and carcinogenic effects of ETS and mainstream smoke are similar, although the relative concentration of individual components may differ.[8]

Only recently have national public health agencies been able to draw firm conclusions regarding the health effects of exposure to ETS. In 1979, the Surgeon General reported that tobacco smoke can be a significant source of air pollution indoors.[9] Under conditions of heavy smoking and poor ventilation, the concentration of carbon monoxide level in the air may exceed the maximum limit for exposure during and eight-hour workday (fifty parts per million (ppm)).[10] Even with adequate ventilation, the concentration of atmospheric carbon monoxide may exceed nine ppm, the allowable ambient air quality limit set by the Environmental Protection Agency (EPA).[11]

In 1982 the Surgeon General reported that "[a]lthough the currently available evidence is not sufficient to conclude that passive or involuntary smoking causes lung cancer in nonsmokers, the evidence does raise concern about a possible serious public health problem."[12] The Surgeon General reported in 1984 that studies have found differences in measures of pulmonary function between subjects chronically exposed to ETS and those who were not.[13]

By 1986 the scientific evidence became strong enough for the Surgeon General to state conclusively that ETS causes non-smokers to develop lung cancer:

> In examining a low-dose exposure to a known carcinogen, it is rare to have such an abundance of evidence on which to make a judgment, and given this abundance of evidence, a clear judgment can now be made: exposure to ETS is a cause of lung cancer. The data presented in this Report establish that a substantial number of the lung cancer deaths that occur among nonsmokers can be attributed to involuntary smoking.[14]

The 1986 Report also found that acute and chronic respiratory diseases have been linked to ETS.[15] In sum, the Surgeon General concluded, "[i]nvoluntary smoking is a cause of disease, including cancer, in healthy nonsmokers."[16]

Concerning the critics of studies demonstrating the adverse health effects of ETS, the Surgeon General in the 1986 Report warned:

> Critics often express that more research is required, that certain studies are flawed, or that we should delay action until more conclusive proof is produced. As both a physician and a public health official, it is my judgment that the

> time for delay is past; measures to protect the public health are required now. The scientific case against involuntary smoking as a health risk is more than sufficient to justify appropriate remedial action, and the goal of any remedial action must be to protect the nonsmoker from environmental tobacco smoke.[17]

If the time for delay had passed by 1986, additional scientific evidence uncovered since then makes the Surgeon General's warning even more urgent in 1991.

A draft report released by the EPA concluded:[18]

> (1) ETS is causally associated with lung cancer in nonsmoking adults and that, according to EPA guidelines for carcinogen risk assessment, ETS is a Group A (known human) carcinogen; and
>
> (2) approximately 3800 lung cancer deaths per year among nonsmokers (never-smoker and former smokers) of both sexes in the United States are attributable to ETS.

55 Fed. Reg. 25,874 (1990).

The EPA classifies suspected human carcinogen into three groups. Group A consists of known human carcinogens;

Group B, probable human carcinogens; Group C, possible human carcinogens; Group D, agents that are unclassifiable as to human carcinogenicity; and Group E, agents that have shown evidence of non-carcinogenicity for humans.[19] Examples of Group A carcinogens are arsenic, asbestos, benzene, chromium compounds, and vinyl chloride.[20] If there were any doubt about the causative and quantitative link between lung cancer and ETS exposure, the EPA draft report firmly concludes that ETS is a definite and significant cause of lung cancer in humans.

2. Exposure to ETS in Prisons.

The parties agree that two-thirds of the inmates at Carson City smoke.[21] The state does not dispute that McKinney is confined to a six-foot by eight-foot room with poor ventilation and that his roommate smokes five packs of cigarettes a day. The state also admits that, other than in the infirmary and the culinary, there is no restriction on smoking in the prison.

Unlike the general population, prisoners are not free to avoid or leave places where smoking is allowed. Prisoners cannot simply leave their cells when their cellmates decide to light up. In addition, because smoking is permitted virtually everywhere in the prison, and because it is undisputed that a clear majority of the prisoners are smokers, McKinney is almost constantly exposed to ETS at elevated levels. A reasonable factfinder could conclude that the adverse health effects associated with ETS exposure would be especially severe for McKinney.

3. Unconstitutional Condition of

confinement.

The court in Gorman reasoned that despite the scientific evidence that exposure to ETS is harmful to health, our society's standards of decency do not yet demand a smoke-free environment in a prison setting. Gorman, 710 F. Supp. at 1262. In our circuit, however, a finding that ETS endangers human health is sufficient to show an Eighth Amendment violation, even without a separate inquiry into society's evolving standards of decency. Our prior decision in Hoptowit clearly established that the Eighth Amendment's ban of cruel and unusual punishments prohibits conditions of confinement that pose unreasonable threats to inmates' health.

In Hoptowit, we held that "[p]ersons involuntarily confined by the state have a constitutional right to safe conditions of confinement." 753 F.2d at 784 (citing

Youngberg v. Romeo, 457 U.S. 307 (1982)). While not every deviation from ideally safe conditions may amount to a constitutional violation, we ruled that conditions of confinement that seriously threaten the health and safety of the inmates are unconstitutional. Id. at 783-84.

Our prior cases demonstrate that the difference between constitutional and unconstitutional conditions of confinement can turn on the air that the prisoners breathe. In Hoptowit, we held that housing inmates in units with inadequate ventilation and air flow is unconstitutional. Id. at 784. In Spain, we held that denying prisoners fresh air and opportunities for regular outdoor exercise violates the Eighth Amendment. 600 F.2d at 199.

If making inmates breathe stagnant air is cruel and unusual punishment, it must be even more so to force inmates to breathe air containing levels of known human carcinogens sufficient to pose an unreasonable risk of harm to human health. It is hard to imagine that our society would tolerate exposing inmates to dangerous levels of any other Group A carcinogens, like benzene, asbestos or arsenic.

Poor air quality is not the only condition of confinement that may unconstitutionally threaten the health and hygiene of prisoners. We have held that poor lighting, broken-down plumbing, unsanitary food handling, and polluted water can also violate prisoners' Eighth Amendment rights. See Hoptowit, 753 F.2d at 783; Jackson v. Arizona, 885 F.2d 639, 641 (9th Cir. 1989). We have not waited until these conditions actually caused illness, but have mandated relief based on the risk these conditions entail. See id.

We draw additional support for our view from decisions in other circuits. See Martin v. Sargent, 780 F.2d 1334, 1338 (8th Cir. 1985) (allegations of inadequate diet, unhealthy physical condition of the prison, denial of personal hygiene items, and the lack of sufficient opportunity to exercise each state a valid Eighth Amendment claim); Ramos v. Lamm, 639 F.2d 559, 567-72 (10th Cir. 1980) (inadequate ventilation, obstructed plumbing system, and unsanitary living quarters are constitutionally impermissible); Cunningham v. Jones, 567 F.2d 653, 660 (6th Cir. 1977) (improper diet for prisoners violates the Eighth Amendment); Gates v. Collier, 501 F.2d 1291, 1302 (5th Cir. 1974) (holding that conditions of confinement that clearly threaten the health of the prisoners and substantially deprive them of basic elements of hygiene are unconstitutional).

Under Hoptowit and Spain, it is established that conditions in a prison that threaten a prisoner's health constitute cruel and unusual punishment. Scientific evidence is clear that exposure to ETS can have serious adverse health consequences. If housing nonsmokers and smokers in the same prison cell or allowing unrestricted smoking in other parts of the prison exposes nonsmoking inmates to a level of ETS that poses an unreasonable risk to their health, the Eighth Amendment is violated.

4. Evolving Standard of Decency.

Thus, McKinney's claim may well fit within the boundaries of conditions of confinement that we have held unconstitutional because they pose unreasonable risks of harm to prisoners' health. In addition, we conclude that the attitude of our society has evolved at least to the point that it violates current standards of decency to expose unwilling prisoners to ETS levels that pose an unreasonable risk of harm to their health.

To determine the prevailing attitude of the society, we review the statutes and regulations that society has enacted.[22] As noted earlier in the discussion of Avery, as of 1987 forty-five states and the District of Columbia had enacted statutes restricting smoking in public places. Avery, 695 F. Supp. at 640. A significant percentage of the statutes were passed by lawmakers motivated by health concerns about exposure to ETS. Id. In fact, Nevada's anti-smoking statute,[23] which bans or restricts smoking in "public places," declares that the purpose of the statute is to restrict smoking to protect human health and safety. "The quality of air is declared to be affected with the public interest and [this statute is] enacted in the exercise of the police power of this state to protect the health, peace, safety and general welfare of its people." Nev. Rev. Stat. § 202.249 (1987). Other states' anti-smoking statutes contain similar language.[24]

At the federal level, smoking is banned on all domestic airline flights, except flights to and from Alaska and Hawaii. 49 U.S.C.A. App. § 1374(d) (West Supp. 1990). Smoking is also restricted or prohibited in many places by regulations promulgated by federal agencies pursuant to their rule-making authority. See 14 C.F.R. §§ 252.1 - .7 (1990) (regulation for restricting smoking on flights on which smoking is not otherwise banned); 41 C.F.R. § 101-20.105-3 (1990) (regulations for controlling smoking in facilities owned by the General Services Administration); and 49 C.F.R. § 1061.1 (1988) (regulation for limiting smoking on interstate passenger carriers).

Most significantly, prisons and jails are beginning to take steps to restrict or ban smoking. A federal Bureau of Prison regulation prohibits smoking in those areas of federal penitentiaries where "smoking would pose a hazard to health or safety" and allows the warden to designate smoking and no-smoking areas in other areas. 28 C.F.R. § 551.162 (1989). The American Jailers Association, which represents 6,500 jail administrators, passed a resolution endorsing bans on smoking by inmates.[25] As of May, 1990, county and state corrections departments in thirteen states have either banned or are considering banning smoking.[26]

At the local level, more than eighty cities and counties have enacted smoking laws since 1980.[27] The most comprehensive anti-smoking ordinance was passed in San Luis Obispo, California. The ordinance prohibits smoking in any indoor public area in San Luis Obispo, including all shops, restaurants, and bars.[28]

This review of legislation and regulations shows that society sees a need to protect non-smokers from involuntary exposure to ETS, which is increasingly regarded as a hazard to the health of non-smokers. Prohibition or restriction of smoking in jails and prisons across the country indicates that at least some states and the federal government have already recognized that inmates deserve protection for ETS.

5. Conclusion.

We hold that McKinney has stated a valid Eighth Amendment claim for injunctive relief by alleging that his exposure to ETS in the prison is harmful to his health. This claim for injunctive relief is remanded to the district court for further proceedings consistent with this opinion.[29] McKinney should be allowed to present evidence regarding the level and degree of his exposure to ETS and whether that degree of exposure is sufficient to create an unreasonable risk of harm to his health. Because of the complexity of McKinney's case and the difficulty of gathering and presenting medical and technical evidence on the long-term effects of exposure to ETS, the district court should consider, on remand, appointing an attorney to represent McKinney.

6. Damages.

Our holding that McKinney has stated a cause of action for injunctive relief does not automatically entitle him also to pursue his claim for damages. The defendants have raised the affirmative defense of qualified immunity, which shields them from liability for damages if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Officials pleading qualified immunity are liable for damages only if the contours of the right they are alleged to have violated are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). At the time the defendants acted, there was no clearly established liability for exposing prisoners to ETS. The defendants are therefore entitled as a matter of law to prevail on their defense of qualified immunity, and McKinney's claim for damages must fail.

B. Does the Nevada Anti-Smoking Statute Apply to Prison Libraries?

McKinney argues that the Nevada anti-smoking statute[30] applies to prison libraries and that the defendants have violated his due process rights by failing to apply the statute to restrict smoking in the library. Prisoners claiming a due process violation under the Fourteenth Amendment must demonstrate that they have been deprived of a protected liberty or property interest by arbitrary government action. Meachum v. Fano, 427 U.S. 215, 226-27 (1976). These interests may arise from the Constitution or statutes. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 7-11 (1979).

In Gorman, the plaintiff argued that the Indiana anti-smoking law, which makes it illegal to smoke in public buildings except in designated smoking areas, applies to prison facilities. 710 F. Supp. at 1263. The court in Gorman held that the Indiana statute does not create a protected liberty interest for prisoners because the statute's definition of "public building" does not include prisons. Id. The Indiana statute defines "public building" as an enclosure or a part of an enclosure that "is occupied by any agency of state or local government" or is used as a public school or as a licensed health facility. Id.

The court in Avery, in contrast,

found that the definition of "enclosed public places" in the anti-smoking legislation of New Hampshire does include prisons. 695 F. Supp. at 640. The New Hampshire law defines "enclosed public places" as "'any enclosed, indoor area which is publicly owned or supported by tax revenues.'" Id. (quoting N.H. Rev. Stat. Ann. 155:45-53 (Equity Supp. 1987)).

The Nevada statute does not define public places or building. Instead, it prohibits or limits smoking in certain specific public places, including any "[p]ublic elevator, library, museum, or a bus used by the general public, other than a chartered bus." Nev. Rev. Stat. § 202.2491.1(a) (1987). The Attorney General of Nevada interprets the provision to mean that the smoking law applies to all libraries, whether they be publicly or privately operated. 191 Nev.

Op. Att'y Gen. 46, 47 (1975). If the Attorney General is correct, the statute should apply to prison law libraries as well.

In the absence of any decisional law interpreting the Nevada law, we believe that Nevada courts would find the attorney general's opinion persuasive. In addition, we fail to see why the public policy of the state of Nevada to protect the health of its people from ETS[31] should not apply within prison walls. Therefore, we hold that the Nevada anti-smoking statute applies to state prison law libraries. We further hold that the statute creates a liberty interest in smoke-free prison libraries that is protected by the due process clause. We reverse the magistrate's ruling and remand for further proceedings on this claim for injunctive relief.[32]

C. Should the Magistrate Have Appointed

an Expert Witness?

Important to McKinney's case would be the testimony of an environmental toxicologist regarding the health effects of exposure to ETS. Because he was unable to find an expert who would testify without a fee, McKinney requested that the district court appoint an expert witness at government expense under Fed. R. Evid. 706. The magistrate denied his requests.

Under Rule 706, the court may on its own motion or on the motion of another party appoint an expert witness. Fed. R. Evid. 706(a). The expert so appointed is entitled to reasonable compensation as the court may allow, and in a civil case the compensation is "paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs," unless funds have been provided by law to pay the compensation. Fed. R. Evid. 706(b).

The magistrate found that because no fund have been provided by law to pay the compensation of an expert witness in civil rights cases, any expert appointed by the court must be paid by the parties. The magistrate then ruled that no expert may be appointed in the present case because McKinney, who proceeded in forma pauperis, would be unable to pay his proportion of the fees. The magistrate interpreted Rule 706(b) as allowing court-appointed experts only when both sides are able to pay their respective shares.

We believe that the magistrate's ruling was based upon an unduly restrictive reading of the rule. As we noted in Students of Cal. School for the Blind v. Honig, 736 F.2d 538, 549 (9th Cir. 1984), "Rule 706 . . . allows the court to assess the cost of the expert's compensation as it deems appropriate." We believe that the phrase "such proportion as the court directs," in an appropriate case, permits the district court to apportion all the cost to one side. Otherwise, we are faced with an inflexible rule that would prevent the district court from appointing an expert witness whenever one of the parties in an action is indigent, even when the expert would significantly help the court.

We hold that the district court does have the discretion to appoint an expert witness in this case and that McKinney is entitled to the benefit of the court's exercise of its discretion. Considering the complexity of the scientific evidence in the present case, we recommend that, on remand, the district court consider appointing an expert witness or witnesses who can provide the court with scientific information on the health effects of ETS and on the concentration levels of ETS in the Carson City prison.

D. Did the District Court Err in Entering a Directed Verdict in Favor of the Defendants on McKinney's Deliberate Indifference Claim?

Our role in reviewing a directed verdict is the same as the district court's. The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1151 (9th Cir. 1988). A directed verdict is proper if, without considering the "credibility of the witnesses, we find that the evidence and its inferences, considered as a whole and viewed in the light most favorable to the nonmoving party, can support only one reasonable conclusion--that the moving party is entitled to judgment . . . " Id. (citation and internal quotation omitted).

The magistrate allowed McKinney to

go to trial before a jury on the issue of whether the defendants were deliberately indifferent to existing serious medical symptoms.[33] There is no evidence in the record to suggest that prison officials were deliberately indifferent to McKinney's existing medical symptoms. McKinney was examined by the prison doctor, who found no serious existing ailments requiring treatment. We therefore affirm the magistrate's ruling directing a verdict on the issue of defendants' deliberate indifference to McKinney's asserted medical symptoms.

E. Did the District Court Err in Denying McKinney's Motion for Production of Trial Transcripts at Government Expense?

In appealing the decision of the district court, McKinney asked for the production of the trial record at government expense. Production of the transcript at government expense for appellant in forma pauperis in a civil case is proper under 28 U.S.C. § 753 if a trial judge certifies that the appeal is not frivolous and presents a substantial question. 28 U.S.C.A. § 753(f) (West Supp. 1990).

Of the issues raised by McKinney, the only one that requires the trial transcript is his claim that the district court erred in granting the directed verdict. The magistrate denied McKinney's motion, holding that she was unable to certify that the appeal is not frivolous because she was unable to determine on what grounds McKinney was seeking to overturn the directed verdict. McKinney merely stated conclusorily in his motion that the trial court erred in granting defendants' motion for a directed verdict but failed to point to specific errors made by the magistrate in entering the directed verdict.

The relief under section 753 is permissive. Because the record does not indicate that the magistrate abused her discretion in denying McKinney's motion, we affirm the magistrate's ruling.

CONCLUSION

We conclude that the Eighth Amendment forbids prison officials from housing McKinney in a prison environment that exposes him to levels of ETS that pose an unreasonable risk of harming his health. He has therefore stated a valid cause of action and may be entitled to injunctive relief. We reverse and remand this claim for further equitable proceedings, including a trial, if necessary, with the possible assistance of an attorney and an expert witness.[34] We also hold that Nevada's anti-smoking statute applies to prison libraries and remand McKinney's due process claim for further equitable proceedings. Although these claims for injunctive relief may proceed, McKinney's claims for money damages must fail because, in the circumstances of this case, state prison officials are entitled to qualified immunity as a matter of law. We affirm the magistrate's grant of a directed verdict on the issue of defendants' indifference to McKinney's immediate medical symptoms and also affirm her denial of McKinney's motion for a free trial transcript.

AFFIRMED IN PART, REVERSED IN PART and REMANDED

COUNSEL

William McKinney, In Pro Per, Carson City, Nevada.

Kevin G. Higgins, Deputy Attorney General, Carson City, Nevada, for defendants-appellees.

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[*] The panel unanimously found this case suitable for decision without oral argument. Fed. R. Ap. P. 34(a) and Ninth Circuit Rule 34-4.

[1] McKinney also named two cigarette manufactures and a distributor of cigarettes sold in the prison. The companies were never served with the complaint and have not made an appearance in the action.

[2] The parties consented to have a United States Magistrate conduct the trial and order the entry of a final judgment. Under 28 U.S.C. § 636(c)(3), parties may appeal "directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court." 28 U.S.C.A. § 636(c)(3) (West Supp. 1990).

[3] Gorman v. Moody, 710 F. Supp. 1256 (N.D. Ind. 1989) is not to the contrary. In Gorman, the district court held that, even if it could be shown that ETS is harmful to non-smokers' health, the "'standards of decency that mark the progress of society'" have not evolved to the stage where the Eighth Amendment mandates a smoke-free environment in a prison setting. Id. at 1262. But as noted above, the right to an utterly smoke-free environment is not the real questions. While the Constitution may not mandate a smoke-free environment, it does mandate an environment that does not expose inmates to a significant risk of harm to their health. Similarly, in Caldwell v. Quinlan, 729 F. Supp. 4,

(D.D.C. 1990), aff'd, 1990 U.S. App. LEXIS 18664 (D.C. Cir. 1990), the court held that a totally smoke-free environment was not required where prison authorities had already provided separate housing units and other facilities for non-smokers. Id. at 5-6. That conclusion is not inconsistent with our decision here.

[4] U.S. Dep't of Health and Human Services, Reducing the Health Consequences of Smoking: 25 Years of Progress, A Report of the Surgeon General 11 (1989) (hereinafter "1989 Report").

[5] National Research Counsel, Environmental Tobacco Smoke: Measuring Exposures and Assessing Health Effects 2 (1986) (hereinafter "NRS Report"). The report was prepared by the National Research Counsel in response to a request from two federal government agencies, the Office of Air and Radiation of the Environmental Protection Agency and the Office of Smoking and Health of the Department of Health and Human Services.

[6] 1989 Report, at 12.

[7] U.S. Dep't of Health and Human Services. The Health Consequences of Involuntary Smoking, A Report of the Surgeon General 7 (1986) (hereinafter "1986 Report").

[8] Id. at 7-8.

[9] U.S. Dep't of Health, Education, and Welfare, Smoking and Health, A Report of the Surgeon General ch. 11, at 32 (1979).

[10] Id.

[11] Id. at 21.

[12] U.S. Dep't of Health and Human Services, The Health Consequences of Smoking: Cancer, A Report of the Surgeon General at 9 (1982).

[13] U.S. Dep't of Health and Human Services, The Health Consequence of Smoking: Chronic obstructive Lung Disease, A Report of the Surgeon General 405 (1984).

[14] 1986 Report, at 10. The NRC Report, supra n. 5, also released in 1986, came to the same conclusion as the Surgeon General's report. It concluded that "[c]onsidering the evidence as a whole, exposure to ETS increases the incidence of lung cancer in nonsmokers." Id. at 10.

[15] 1986 Report, at 10.

[16] Id. at 7.

[17] 1986 Report, at xi-xii.

[18] Environmental Protection Agency, Health Effects of Passive Smoking; Assessment of Lung Cancer in Adults and Respiratory Disorders in Children; External Review Draft, 55 Fed. Reg. 25,874 (1990). The announcement in the Federal Register states that the draft report was prepared pursuant to the Superfund Act. A final report is expected in the summer of 1991.

[19] Environmental Protection Agency, Methodology for Evaluating Potential Carcinogenicity in Support of Reportable Quantity Adjustments Pursuant to CERCLA

Section 102 13-16 (1988).

[20] Id. app. at 37-42

[21] Nationwide, the proportion of smokers in prisons is 90 percent. N.Y. Times, July 9, 1990 at A10, col. 5.

[22] This approach is consistent with that taken in Thompson v. Oklahoma, 487 U.S. 815 (1988), in which both the plurality and the dissent relied on state statutes to determine the attitude of society regarding the appropriateness of death penalty for those who committed crimes while minors. See also Gorman, 710 F. Supp. at 1261; Avery 695 F. Supp. at 639 (citing Thompson).

[23] Nev. Rev. Stat. §§ 202.249 - .2492 (1987).

[24] See Clemons, 1990 U.S. App. LEXIS 17683, at *24-*25; Avery, 695 F. Supp. at 640.

[25] N.Y. Times, July 9, 1990 at A10, col. 5.

[26] Id.

[27] 1986 Report, at 324.

[28] L.A. Times, August 2, 1990, at A3, col. 2.

[29] This court does not have enough facts about the conditions of the prison to decide what kind of separation of smokers and non-smokers would meet the constitutional standard.

[30] Nev. Rev. Stat. §§ 202.249 - .2492

(1987).

[31] Nev. Rev. Stat. § 202.249.

[32] Because no court has previously held that the Nevada statute applies to prison libraries, the defendants have not violated clearly established law. Their valid claim to qualified immunity therefore precludes McKinney from proceeding with his claim for damages.

[33] This issue, although also based on the Eighth Amendment, is different from the question whether prisoners are constitutionally entitled to be free from compelled exposure to levels of ETS that pose an as-yet-unrealized risk of harming their health.

[34] Our decision to remand obviates the need to rule on whether the magistrate correctly granted the defendants' motion in limine.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM McKINNEY,

Plaintiff,

vs.

PAT ANDERSON, et al.,

Defendants.

Case Number:
CV-N-87-36-PHA

ORDER ENTERING JUDGMENT IN FAVOR OF DEFENDANTS

Inmate William McKinney filed a lawsuit against various officials of the Nevada Department of Prisons alleging that he had a constitutional right to be free from exposure to secondary cigarette smoke. He claimed that his health had been damaged by such exposure and that prison officials had refused to move him to a cell where he would not be subjected to that smoke. McKinney also stated claims against various tobacco companies, but failed to appropriately serve them and they are not parties at this time in this case.

After pretrial motions were heard, the parties in the joint pretrial order narrowed the issues to:

> (1) Whether McKinney had requested to be housed with a non-smoker;
>
> (2) What Defendants had done to accommodate those wishes;
>
> (3) To what degree McKinney had been exposed to cigarette smoke;
>
> (4) Whether McKinney's health had been injured by that exposure;
>
> (5) Whether McKinney had any medical conditions that made him susceptible to injury from such exposure;
>
> (6) How each Defendant was personally involved in the alleged constitutional deprivations; and
>
> (7) How a smoking ban would affect the Nevada State Prison.

The essential issues of law were whether McKinney had a constitutional right to be housed in a smoke-free environment and whether Defendants were deliberately indifferent to McKinney's serious medical needs.

A review of the pertinent case law reveals that there is no constitutional right to be housed with a non-smoker. This issue is one of first impression for this district court and has only recently been considered in other district courts across the country. The most recent published decision about this issue is Gorman v. Moody, 710 F. Supp. 1256 (D. Ind. 1989). The judge in Gorman has announced what appears to be the consensus of the federal courts as to this issue. While the court recognized that society may be moving toward an opinion as to the propriety of non-smoking and a smoke-free environment, society cannot yet completely agree on the propriety of non-smoking areas and a smoke-free environment.

> Whether to provide smoke-free areas must be left to the discretion of legislatures and prison officials who must operate the prison to the best of their abilities, and those officials must make those decisions after consideration of all factors relevant to the particular institution and the care and welfare of all inmates.

Gorman at 710.

In Beeson v. Johnson, 668 F. Supp. 498 (E.D.N.C. 1987), the court held that the present state of the law seems to be that "persons who are not incarcerated have no constitutional right to a smoke-free environment." Beeson at 501. Nor would apparently inmates have such a right.

In Lee v. Carlson, 645 F. Supp. 1430 (N.D.N.Y. 1986), the court held that a similar complaint by an inmate failed to state a cause of action against other defendants ". . . because there is no allegation in the complaint, and nothing in the record, to indicate that plaintiff was being exposed to smoke in violation of any then-existing statute or regulation, or that any of the other defendants acted unreasonably under the circumstances in exposing plaintiff to tobacco smoke." Lee at 1438.

No court has gone so far as to state that there is a constitutional right for an inmate to be free from exposure to cigarette smoke. The other courts' reasoning is hereby adopted and it is held that there is no constitutional right for an inmate to be free from secondary cigarette smoke.

At best, as the courts above noted, inmates alleging this reported constitutional deprivation may have a claim for deliberate indifference to serious medical needs. In Beeson, the court did not recognize a constitutional right to be housed in a smoke-free environment but allowed the case to proceed on a theory of alleged deliberate indifference to serious medical needs.

The court adopts that reasoning and finds that Plaintiff has no constitutional right to be free from cigarette smoke, but may have been able to state a claim for deliberate indifference to serious medical needs if he could prove the underlying facts. The Gorman court held that the proper standard in evaluating these types of cases is whether prison officials have been deliberately indifferent to a threat against the inmate and in order to prove so, plaintiff must show that the prison officials intentionally exposed him to a known risk or harm and actually intended to harm him. Gorman at 1260, citing Simpson v. Broglin, 612 F. Supp. 1162 (N.D. Ind. 1985). Thus, in order to survive Defendants' motion for a directed verdict, Plaintiff must be able to set forth facts sufficient to establish the Defendants had been deliberately indifferent to his serious medical needs.

Based upon the testimony adduced by McKinney during his presentation of his case, he has failed to show either a serious medical need or deliberate indifference to it. His complaint seems to be that he is subject to nosebleeds, sore throats, watery eyes and similar cold symptoms when exposed to secondary cigarette smoke. But McKinney specifically admitted on cross-examination he has also complained of those symptoms resulting from exposure to butane gas, living on a lower bunk, the quality of water at the prison, as well as the quality of his diet. He further specifically admitted that he had no idea what actually caused these symptoms and just assumed that it was the cigarette smoke.

McKinney further admitted upon cross-examination, and evidence from his witnesses included testimony, that he had been examined for these symptoms by the Nevada State prison medical department, but that Dr. Harrison had found nothing wrong with him for which he could be treated. This is not a case in which an inmate has a serious medical need that has been deliberately ignored. This is a case where an inmate with cold-like symptoms was seen by a professional medical staff, treated and told that his symptoms could not definitely be traced to exposure to cigarette smoke.

Such testimony completely fails to establish deliberate indifference to serious medical needs. Nor does such testimony prove that the acts of the Defendants were the proximate cause of any injuries the Plaintiff might have sustained.

> To prove causation or proximate cause, plaintiff must introduce expert medical evidence which affords a reasonable basis for the court to conclude that it is more likely than not that [Defendants'] conduct was a substantial factor bringing about plaintiff's damages. Proof of a medical causal connection must be something more than consistent with the plaintiff's theory of how the claimed damages were caused. Proof of causation cannot rest on conjecture and the mere possibility of such causation is not enough to sustain the plaintiff's burden of proof. Moreover, when the medical causal relation issue is not one within the common knowledge of laymen, proximate cause cannot be determined without expert medical testimony.

Ellis v. United States, 484 F. Supp. 4, 11 (D.S.C. 1978).

McKinney completely failed to adduce any expert testimony or provide any medical evidence which would prove the Defendants' acts were the proximate cause of his injuries. Nor was there any medical proof or testimony that such exposure to cigarette smoke could even cause such symptoms.

There was no evidence presented of personal involvement by any of the Defendants, nor in accordance with the test announced in Beeson above, was there any indication that any of the Defendants intentionally chose to inflict harm upon the Plaintiff.

McKinney has failed to sustain his burden of proof as a matter of law, and this court has no choice but to grant Defendants' motion for a directed verdict in accordance with Rule 50(a) of the Federal Rules of Civil Procedure.

Judgment is therefore entered in favor of Defendants and against Plaintiff.

DATED this 18th day of OCTOBER, 1989.

SIGNED BY UNITED STATES MAGISTRATE

APPENDIX C

WILLIAM McKINNEY, INMATE #13355
Nevada State Prison
Post Office Box 607
Carson City, Nevada 89701

In Pro Se

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

WILLIAM McKINNEY, Plaintiff, -vs- PAT ANDERSON, ET AL., Defendants.	Case No. CV-N-87-36-ECR NOTICE OF APPEAL

Notice is hereby given that William McKinney, plaintiff in the above-entitled matter appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 27th, 1989, by the United States Magistrate, P. H. Atkins.

Dated this 21 day of November, 1989.

Respectfully submitted

By ____________________________________
William McKinney

APPENDIX D

Assembly Bill No. 597--Assemblymen Haller, Anderson, Gibbons, Petrak, Norton, Wong, Bergevin, Johnson, Stout, Bennett, Elliott, Sader, Humke, McGaughey, McGinness, Hardy, Pettyjohn, Arberry and Price

CHAPTER.......

AN ACT relating to public health; clarifying the inapplicability to prison facilities of certain restriction on smoking; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 202.2491 is hereby amended to read as follows:

202.2491 1. Except as otherwise provided in subsections 5 and 6, the smoking of tobacco in any form is prohibited if done in any:

(a) Public elevator.

(b) Public building.

(c) Public waiting room, lobby or hallway of any:

(1) Medical facility or facility for the dependent as defined in chapter 449 of NRS; or

(2) Office of any chiropractor, dentist, physical therapist, physician, podiatrist, psychologist, optician, optometrist, doctor of Oriental medicine or doctor of acupuncture.

(d) Hotel or motel when so designated by the operator thereof.

(e) Public area of a store principally devoted to the sale of food for human consumption off the premises, except in those areas leased to or operated by a person licensed pursuant to NRS 463.160.

(f) Child care facility.

(g) Bus used by the general public, other than a chartered bus, or in any maintenance facility or office associated with a bus system operated by any regional transportation commission.

(h) School bus.

2. The person in control of an area listed in paragraph (c), (d), (e), (f) or (g) of subsection 1:

(a) Shall post in the are signs prohibiting smoking in any place not designated for that purpose as provided in paragraph (b).

(b) May designate separate rooms or portions of the area which may be used for smoking.

3. The person in control of a public building:

(a) Shall post in the area signs prohibiting smoking in any place not designated for that purpose as provided in paragraph (b).

(b) Shall, except as otherwise provided in this subsection, designate a separate area which may be used for smoking.

A school district which prohibits the use of tobacco by pupils need not designate an area which may be used by the pupils to smoke.

4. The operator of a restaurant with a seating capacity of 50 or more shall maintain a flexible nonsmoking area within the restaurant and offer each patron the opportunity to be seated in a smoking or nonsmoking area.

4. A business which derives more than 50 percent of its gross receipts from the sale of alcoholic beverages or 50 percent of its gross receipts from the sale of alcoholic beverages or 50 percent of its gross receipts from gaming operations may be designated as a smoking area in its entirety by the operator of the business.

6. The smoking of tobacco is not prohibited in:

(a) Any room or area designated for

smoking pursuant to paragraph (b) of subsection 2 or paragraph (b) of subsection 3.

(b) A licensed gaming establishment. A licensed gaming establishment may designate separate rooms or areas within the establishment which may or may not be used for smoking.

7. The person in control of a child care facility shall not allow children in any room or area he designates for smoking pursuant to paragraph (b) of subsection 2. Any such room or area must be sufficiently separate or ventilated so that there are no irritating or toxic effects of smoke in the other areas of the facility.

8. As used in this section:

(a) "Child care facility" means an establishment licensed pursuant to chapter 432A of NRS to provide care for 13 or more children.

(b) "Licenses gaming establishment" has the meaning ascribed to it in NRS 463.0169.

(c) "Public building" means any building or office space owned or occupied by:

(1) Any component of the University of Nevada System and used for any university purpose.

(2) The State of Nevada [or any] and used for any public purpose, other than that used by the department of prisons to house or provide other services to offenders.

(3) Any county, city, school district or other political subdivision of the state and used for any public purpose.

If only part of a building is owned or occupied by an entity described in this paragraph, the term means only that portion of the building which is so owned or occupied.

(d) "School bus" has the meaning ascribed to it in NRS 483.160.

Sec. 2. This act becomes effective at 12:03 a.m. on October 1, 1991.

WILLIAM McKINNEY, INMATE #13355
Nevada State Prison
Post Office Box 607
Carson City, Nevada 89701

In Pro Se

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

WILLIAM McKINNEY,

Plaintiff,

-vs-

PAT ANDERSON, ET AL.,

Defendants.

Case No.
CV-N-87-36-ECR

MOTION FOR
SUBPOENA TO
PRODUCE AN
EXPERT WITNESS
AT TRIAL

Comes Now, William McKinney, plaintiff in Pro Se, and moves this court, pursuant to Fed. R. Civ. P. Rule 45 (A), (b), (c), (E), and F.R.C.P. Rule 26(b)(4) etseq, for an order securing an expert witness at his trial set to commence on September 22nd, 1987.

That this motion is made and based

upon all the motions, affidavits, pleadings and the verified civil rights complaint on file in the above-entitled court.

For cause of said motion plaintiff shows viz:

1. That it is important to his case that the court issue a subpoena for one or all of the following persons:

(A) The Surgeon General, expert on cigarette smoking;

(B) A representative from Action on Smoking & Health;

(C) National Interagency Council on Smoking & Health, representative;

(D) A representative from the Food & Drug Administration.

2. Any of the above-named representatives is an authority on the effects cigarette smoking would have on a non-smoker housed in close confines with a heavy cigarette smoker.

DATED this 19 day of August 1987.

Respectfully submitted

By ___________________________
William McKinney

WILLIAM McKINNEY, INMATE #13355
Nevada State Prison
Post Office Box 607
Carson City, Nevada 89701

In Pro Se

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

WILLIAM McKINNEY, Plaintiff, -vs- PAT ANDERSON, ET AL., Defendants.	Case No. CV-N-87-36-ECR AFFIDAVIT IN SUPPORT OF MOTION FOR SUBPOENA TO PRODUCE WITNESS AT TRIAL

STATE OF NEVADA
SS.
COUNTY OF CARSON

I, William McKinney, being first duly sworn according to law, deposes and avers that:

1. I am the plaintiff in the above-entitled action; I bring this affidavit in good faith; I believe that I am entitled to the relief sought; that this action seeks to compel the

attendance of an expert witness to testify at the trial scheduled for September 22nd, 1987, concerning his professional opinion of cigarette smoking, what health damage a non-smoker could suffer by being in close confines with a person that smoke five (5) packs of cigarettes a day. His expert knowledge of the danger of cigarette smoke.

2. Plaintiff believes that he has suffered serious damage to his throat and vocal cords to the extent of changing his voice. Plaintiff intends to introduce evidence at trial to show that he used his voice to make demo-tapes of songs he had written, and that he had been successful in his song writing career, that vocalist-musician, Paul Anka, sent an attorney, after listening to a song sung by plaintiff on demo-tape, from Las Vegas Nevada to the Nevada State prison

to buy the song. Plaintiff will introduce evidence to show that he was inspired by Paul Anka's offer to buy his song to continue to sing and write songs even after his incarceration. But, because prison officials failed to comply with his requests to be housed with a nonsmoker he suffered some damage to his vocal cords which henders him from singing the lyrics that he write.

3. That plaintiff-affiant believes that he could have made a profitable career out of his song writing talent had he not been forced to live in close quarters with a heavy smoker.

4. That he requested medical treatment from the prison's medical staff for his exposure to cigarette pollution, but he was told that he could not be treated for his ailments from cigarette pollution because there was no such treatment available.

5. That this affidavit is further made in support of the civil rights complaint in this action.

Plaintiff understands that any false statement made by him, not on his belief, in this declaration will subject him to the penalties of perjury, pursuant to 28 U.S.C. 1746, 18 U.S.C. 1621.

Dated this 19 day of August, 1987.

Respectfully submitted

By ____________________________
William McKinney

APPENDIX F

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM McKINNEY,)
) Case No.
Plaintiff,) CV-N-87-36-ECR
)
vs.)
) ORDER
PAT ANDERSON, et al.,)
)
Defendants.)
)

Pending in the above-entitled matter are plaintiff's Motion for Subpoena to Produce Expert Witnesses (court docket #14A) and Petition for Writ of Habeas Corpus Ad Testificandum (court docket #14B) both filed August 21, 1987. The pleadings arose from plaintiff's attempt to secure witnesses to testify at a combined hearing on plaintiff's Motion for Preliminary Injunction and trial on the merits which had been set for September 22, 1987 but vacated on defendants' motion to allow consideration of their Motion for Summary Judgment.

Strictly speaking, the motions are moot; however, a report and recommendation is being entered recommending that defendants' Motion for Summary Judgment be denied. If the District Court issues its order adopting the recommendation, plaintiff may be expected to renew his requests. A ruling on these requests should expedite and clarify the evidentiary situation for the parties.

Plaintiff's motion for a subpoena to produce an expert witness at trial requests the court to issue a subpoena for one or all of the following: (1) the Surgeon General of the United States; (2) a representative from Action on Smoking and Health; (3) a representative from the National Interagency Council on Smoking and Health, and/or (4) a representative from the Food and Drug Administration.

Apparently plaintiff intends for the court to locate and procure one or more of these officials to provide testimony for him. He had not provided any information on where such individuals may be found or cited authority to show the court has jurisdiction to take such action. He does not indicate he has communicated with any such person so that he has any idea about their competence or ability to testify about his individual circumstances, etc. Thus, he is also asking the court to pick witnesses for him.

The choosing and obtaining of witnesses for a party is that party's responsibility and in a civil case the paying of witness fees, transportation costs and the like also become that party's responsibility and not the court's or the opposing party's duty. This is so even for plaintiffs who have been allowed to file in forma pauperis. Further, a subpoena for a hearing or trial must be served within the district or if outside the district within 100 miles of the place of the hearing or trial. Fed.R.Civ.P. 45(e)(1). The court suspects these persons may be outside that area and therefore not subject to its subpoena power.

Plaintiff has not shown the court that it has the authority to grant what he requests. He might consider attempting to find a local expert witness from the state university medical school or finding authoritative writings upon the subject he wishes to present. See for example Fe.R.Evid. 803(8) and (18). Whatever he may decide the presentation of his evidence is his responsibility.

Plaintiff's Petition for Writ of Habeas Corpus Ad Testificandum requests the court issue a writ to have prison officials make present for testimony some six inmate witnesses who apparently have been roommates or friend of plaintiff and who have heard him complain about the effects of tobacco smoke on him, etc.

The practice in this district is that when a matter is ready for trial in a civil case involving an inmate plaintiff, the court (without a petition for writ of habeas corpus) orders the defendants' counsel (who is a Deputy Attorney General) to have present for trial plaintiff and any of plaintiff's witnesses who are employee or inmates of the Nevada Department of Prisons. This does not mean that the court will order that all inmates or employees requested be present. The court will require that the plaintiff specify the particular testimony of each witness and why he or she is needed. The court will not order the presence of individuals whose testimony will be repetitious or duplicative of other expected witnesses or documentary evidence. Plaintiff should also consider that he himself should be able to testify to most if not all of the areas he has stated he expects his requested inmate witnesses to testify to. As set forth above, all of the other witnesses listed by plaintiff must be obtained through the usual subpoena process which requires plaintiff to tender the witness fee.

Good cause appearing therefor,

IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for Subpoena to Produce Expert Witnesses (court docket #14A) filed August 21, 1987 is denied; and

2. Plaintiff's Petition for Writ of Habeas Corpus Ad Testificandum (court docket #14B) filed August 21, 1987 is denied.

DATED this 8th day of APRIL, 1988.

UNITED STATES MAGISTRATE

William McKinney, Inmate #13355
Nevada State Prison
Post Office Box 607
Carson City, Nevada 89702

In Pro Se

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

WILLIAM McKINNEY, Plaintiff, -vs- PAT ANDERSON, ET AL., Defendants.	Case No. CV-N-87-36-ECR MOTION FOR COURT APPOINTED EXPERT WITNESS

Comes now, the plaintiff William McKinney, in Pro Se, moves this Honorable Court, pursuant to the Federal Rules of Civil Procedure and the Federal Rules of Evidence 706(A), (b) and (d); F.R.E. 702; F.R.E. 703 and F.R.E. 705, for appointment of an expert witness, an environmental toxicologist, to give testimony and evidence at the trial in this matter.

This Motion is made and based upon all the pleadings, papers, motions and the complaint on file in this court.

This motion is further made and based upon the points and authorities attached hereto.

For cause of said motion plaintiff shows viz:

(1) That the testimony of an environmental toxicologist is absolute necessary to clarify the facts in this case for a jury.

(2) Plaintiff has no training as an environmental toxicologist.

(3) Without the testimony of an environmental toxicologist plaintiff cannot prove the affect of a smoker's sidestream smoke upon a nonsmoker.

(4) That plaintiff has contacted an environmental toxicologist by way of

letter communication. In his reply to plaintiff's letter, the toxicologist stated as follows:

> "Dear McKinney:
>
> Excuse the handwritten note - I was about to leave town when the Dean sent your letter to me.
>
> I am an environmental toxicologist (trained at the Johns Hopkins Univ.) and have served as an expert witness in alcohol, drug & toxicity. My consulting work is not associated directly with the university. My fee is $80/hr.
>
> I'll be happy to discuss your case with you upon my return on 9 (sic) May 88."

(5) Plaintiff is in dire need of this environmental toxicologist's testimony concerning the danger of side-stream cigarette smoke to a nonsmoker's health, but his indigency prevents him from paying the costs and expenses of the said witness:

A. This witness' fee is eighty dollar an hour;

B. This witness will be needed for approximately three (3) hours during the trial and six (6) hours during investigations by plaintiff.

C. This witness will have to travel from Reno Nevada to the Nevada State Prison in order for plaintiff to investigate him.

D. The Department of Prison do not pay for telephone calls to such witness, and plaintiff is only allowed to make collect calls from the prison.

E. This witness will have to do research on issues raised in plaintiff's civil rights complaint, xerox any information discovered and mail it to the plaintiff or bring it to him.

G. The environmental toxicologist is George G. Bierkamper, Ph.D., is Associate Professor at the University of Nevada School of Medicine. His business address is the Department of Pharmacology, Howard Medical Science Building, Reno, Nevada 89557-0056.

Telephone Number (702) 784-4118.

Dated this 17 day of May 1988

RESPECTFULLY SUBMITTED

By________________________________
William McKinney, In Pro Se

I

POINT AND AUTHORITIES
IN SUPPORT OF MOTION FOR COURT APPOINTED EXPERT WITNESS

See, *F.R.C.P.* *Rule* 26 (b), (4) et seq.

Cf.eq., *Danville Tobacco Assn. v. Bryant-Buckner Associates, Inc.*, 333 F.2d 202 (4th Cir. 1964).

It is important that the jury view the expert witness in person to observe his demeanor while he testify to the dangers a nonsmoker risk by being housed in an 8′ x 6′ room, without ventilation, with a heavy cigarette smoker.

CONCLUSION

Here, plaintiff has shown that he is an indigent prisoner without funds sufficient to cover the expenses of an expert witness who will testify at the trial in this case. The expert witness; testimony is absolute necessary in trial of this case.

Wherefor,

Plaintiff prays that this court appoint an environmental toxicologist as an expert witness for the plaintiff;

That this expert witness be compensated for his participation in trial, discovery research, and travel expenses.

For whatever other relief this court may deem appropriate.

RESPECTFULLY SUBMITTED

By________________________________
William McKinney, In Pro Se

APPENDIX H

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM McKINNEY,

Plaintiff,

vs.

PAT ANDERSON, et al.,

Defendants.

Case No.
CV-N-87-36-ECR

O R D E R

This matter is before the court on the plaintiff's motion for a court appointed expert witness (court docket #23). The defendants have not filed a response.

The plaintiffs allege that the testimony of an environmental toxicologist is necessary in order to clarify the facts of this case for a jury. (Court docket #23, p. 2). The purpose of such testimony is to show the dangerous effect of a smoker's side stream smoke upon a non-smoker. (Court docket #23, pp. 2-3).

The plaintiff urges that the court may appoint such a witness on the authority of Fed.R.Civ.P. 26(b)(4) and Fed.R.Evid., 702, 703, 705 and 706. Review of these rules reveals that only Fed.R.Civ.P. 26(b)(4) and Fed.R.Evid. 706 concern the payment of fees.

Although initially the plaintiff does not state that this expert witness would testify on the plaintiff's behalf, that appears to be his intention. "This witness will have to travel from Reno to the Nevada State Prison in order for plaintiff to investigate him." (Court docket #23, p. 3). Further, "[t]his witness will have to do research on issues raised in plaintiff's civil rights complaint, xerox any information discovered and mail it to the plaintiff or bring it to him." (Id.). The plaintiff estimates that the witness would be needed for three hours during the trial and six hours during investigations by plaintiff. (Id.). Finally, in support of his motion the plaintiff concludes that "[i]t is important that the jury view the expert witness in person to observe his demeanor while he testify to the dangers a nonsmoker risk by being housed in an 8′ x 6′ room, without ventilation, with a heavy cigarette smoker." (Court docket #23, p. 4).

The plaintiff misapprehends the nature of Fed.R.Evid. 706. This rule provided for the appointment of an impartial expert. "^The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection." Fed.R.Evid. 706 (emphasis added). The expert's duties are those which the court informs him or her in writing. Thereafter, the expert advises the parties of his or her findings. Each party may depose the expert. At trial the expert may be called to testify by either party or the court. Additionally, the parties may also call their own expert witnesses. Fed.R.Evid. 706(d).

The appointment of experts by the court occurs rather infrequently. Such appointments are not for the benefit of a particular party. Moreover, court appointed experts do not become the representatives on behalf of a particular party. Such experts serve as an independent source of assistance to the court, and from whom the parties may learn of his or her findings.

Although an expert witness would be of value to the plaintiff, such can be said of virtually all civil cases. At present, the court is not aware of any Nevada or federal statute or rule which provides for the payment of expert witness fees in civil cases on behalf of indigent plaintiff. See, Magistrate's Report and Recommendation, court docket #19, p. 3.

Rule 706 is not such a provision. Fed.R.Evid. 506. It permits a court to appoint its own witness, not to undertake to pay the fees for a party's expert witness. In fact, subsection (b) provides that the compensation for such expert "is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the Fifth Amendment. Fed.R.Evid. 706(b). In all other cases the parties themselves pay for the appointment of the court's expert. "In other civil actions and proceedings the compensation [of the expert witness] shall be paid by the parties...." Id.

Accordingly, the plaintiff's motion

(court docket #23, is denied.

DATED this 2nd day of SEPTEMBER, 1988.

UNITED STATES MAGISTRATE

APPENDIX I

RULE 706. Court Appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

No. 91-269

Supreme Court, U.S.
FILED
SEP 16 1991
OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DONALD L. HELLING, *et al.*,

Petitioners,

v.

WILLIAM McKINNEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Attorneys for Respondent

September 1991

QUESTIONS PRESENTED

1. Should this Court grant review to decide the extent to which the Eighth Amendment protects non-smoking prisoners who are subjected to massive amounts of cigarette smoke from their cellmates and others, when the court of appeals simply remanded the case for a full trial at which all of the relevant evidence will be adduced?

2. Should the Court reverse the ruling of the court of appeals, which is in accord with the two other appellate courts to consider this issue, that a trial court has the discretion to appoint an expert witness under Rule 706 of the Federal Rules of Evidence when the compensation paid to that witness would be borne by one party only?

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IN THE
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DONALD L. HELLING, *et al.*,

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v.

WILLIAM McKINNEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent William McKinney respectfully asks the Court to deny the petition for a writ of certiorari for the reasons stated below.

STATEMENT OF THE CASE

McKinney, a Nevada state prisoner, filed this action *pro se* in the United States District Court for the District of

Nevada in 1987. His complaint, brought under 42 U.S.C. § 1983, sought damages and injunctive relief based on his involuntary exposure to secondary cigarette smoke or environmental tobacco smoke ("ETS") in the Nevada State Prison in Carson City. Named as defendants were the warden and other Carson City prison officials. Some of them no longer hold those offices, but for convenience we refer to the original defendants and/or their successors as petitioners.

McKinney complained that he was a non-smoker who was forced to share a cell with a prisoner who smoked five packs of cigarettes a day and that prison officials refused to move him to a single cell or to house him with a non-smoking cellmate despite his repeated complaints that forced inhalation of smoke was damaging his health. He also objected to the fact that smoking is allowed in the prison library, as it is everywhere in the prison, except the infirmary and the culinary. The record indicates that two-thirds of the prisoners at Carson City prison smoke (Pet. App. A-19-A-20).

The case was tried to a jury before a magistrate who viewed the complaint as stating two Eighth Amendment claims: (1) deliberate indifference to McKinney's existing medical problems, such as nosebleeds, sore throats and similar cold symptoms, and (2) a constitutional right to be housed in a smoke-free environment (Pet. App. B-2-B-3, B-7). The magistrate directed a verdict in favor of petitioners after hearing McKinney and other inmates testify on his behalf.

The magistrate concluded that McKinney's second claim lacked merit because, as a matter of law, he had no right to be free from cigarette smoke while serving in state prison. As to the first claim, she acknowledged that the Eighth Amendment bars petitioners from being deliberately indifferent to McKinney's needs, but found that McKinney's testimony failed to show any serious existing medical need which was not receiving medical care. She noted the absence of any expert or medical testimony showing that petitioners had proximately caused any present injuries and a lack of proof that exposure to ETS could cause various symptoms of which McKinney complained (Pet. App. B-7-B-10).

In reaching this result, however, the magistrate excluded all evidence except that relating to McKinney's current medical symptoms, including documents on the potential future health effects of exposure to ETS (Pet. App. A-4). She also denied McKinney's motion under Rule 706, Fed. R. Ev., to appoint an expert who could testify on scientific issues regarding exposure to ETS, believing that the Rule did not give her the discretion to appoint such an expert if the cost of his testimony would be borne by one side only (Pet. App. F-3, A-37).

The court of appeals unanimously reversed on the Eighth Amendment issue raised by the petition. The court held that the magistrate erred in framing that issue in "all-or-nothing terms," as that approach "excluded a valid eighth amendment claim lying between these two extremes: that compelled exposure to levels of ETS that pose an unreasonable risk of harm to human health constitutes cruel and unusual punishment" (Pet. App. A-5). Thus, the court ruled that a "reasonable factfinder could conclude that the adverse health effects associated with ETS exposure would be especially severe for McKinney" (Pet. App. A-20).

In holding that the Eighth Amendment may be violated if prisoners are exposed to an "unreasonable" risk to their health, the court of appeals cited scientific evidence, including a 1986 Surgeon General's report which stated that "a clear judgment can now be made: exposure to ETS is a cause of lung cancer. The data presented in this Report establish that a substantial number of the lung cancer deaths that occur among nonsmokers can be attributed to involuntary smoking" (Pet. App. A-17). The report added that the scientific case against involuntary smoking as a health risk "is more than sufficient to justify appropriate remedial action, and the goal of any remedial action must be to protect the nonsmoker from environmental tobacco smoke" (Pet. App. A-18). The court also cited a 1990 draft report by the Environmental

Protection Agency which estimated that some 3800 deaths each year among nonsmokers in the United States could be attributed to ETS, which EPA classifies as a Group A (known human) carcinogen, along with such substances as arsenic, asbestos, benzene, chromium compounds and vinyl chloride (Pet. App. A-18-A-19).

In assessing the evolving standards of decency in this area, the court of appeals noted widespread bans on smoking in public places and confined areas, adding that: (1) The federal prison system had moved to protect non-smokers; (2) The American Jailers Association, representing 6500 jail administrators, has backed a ban on smoking in prisons; and (3) As of May 1990, county and state corrections departments in 13 states had either banned or were considering a ban on cigarette smoking (Pet. App. A-27-A-29).

These factors led the court of appeals to conclude that McKinney had stated a claim for injunctive relief and that he "should be allowed to present evidence regarding the level and degree of his exposure to ETS and whether that degree of exposure is sufficient to create an unreasonable risk of harm to his health" (Pet. App. A-30). Citing the lack of evidence upon which it could draw any conclusions about which conditions would cause such an unreasonable risk of harm to McKinney's health, the court remanded the case to district court for a full trial on these issues (Pet. App. A-47 n.29).[1]

The court of appeals also held that the magistrate's refusal to appoint an expert rested on too narrow a reading of Rule 706, Fed. R. Ev., and that she should, on remand, "consider appointing an expert witness or witnesses who can provide the court with scientific information on the health effects of ETS and on the concentration levels of ETS in the Carson City prison" (Pet. App. A-38-A-39). However, the court ruled that McKinney could not pursue a damages claim inasmuch as petitioners enjoy qualified immunity for their actions (Pet. App. A-31). The court also upheld the magistrate's entry of a directed verdict as to McKinney's other Eighth Amendment claim involving his existing medical symptoms (Pet. App. A-39-A-40), held that a Nevada anti-smoking law applies to state prison libraries (Pet. App. A-32-A-35), and held that the magistrate had not erred in denying McKinney's request for production of a trial transcript at the state's expense (Pet. App. A-40-A-42).

---

[1] The court added that the trial court should consider appointing counsel to represent McKinney on remand (Pet. App. A-30). In fact, a Nevada attorney has agreed to represent him in further proceedings in the district court.

Petitioners sought rehearing by the panel and suggested the need for rehearing *in banc*. On 14 May 1991 the panel denied the petition, noting that the suggestion for *in banc* review had been rejected with no judge requesting a vote on the suggestion.

REASONS FOR DENYING THE WRIT

1. This case comes before the Court on the basis of a decision which holds only that McKinney has stated a claim for relief under the Eighth Amendment if he can show that prison officials have housed him "in a prison environment that exposes him to levels of ETS that pose an unreasonable risk of harming his health" (Pet. App. A-42). The court of appeals did not specify what conditions would pose such an unreasonable risk, much less suggest what remedy would be needed if such a risk were found, leaving those questions to be addressed in the first instance by the district court, on the basis of all the evidence presented.

Thus, petitioners are wide of the mark when they argue (at 7) that review should be granted because this case is "of national significance which could have a far-reaching impact" on prison management. At this point in the case, and on this record, it is not clear what impact the court of appeals' ruling will have, either in Nevada or elsewhere. Moreover, the claim that the ruling below will inevitably lead to costly and burdensome changes in the way that prisons are managed is undercut by the fact that the federal prison system, as well as some state prison systems, have taken steps to separate non-smoking prisoners from cigarette smokers. *See* 28 C.F.R. §§ 551.160-551.163 (federal prison officials must designate smoking and non-smoking areas and, "[t]o the extent practicable," place non-smoking inmates in non-smoking quarters; double celling of smoker and non-smoker to be "avoided except where impractical due to circumstances, and then may be done only for limited duration"); *see also West v. Wright*, 747 F. Supp. 329, 332 (E.D. Va. 1990)(describing steps to protect non-smokers in state prison system).

There is another reason why review should be denied at this time: Around the time that the Ninth Circuit issued its decision, McKinney was moved from the Carson City prison to Ely State Prison. Thus, the record contains no facts regarding the conditions of his confinement at Ely insofar as they relate to his exposure to cigarette smoke, nor is there any indication whether this transfer is only temporary or whether he may be transferred back to Carson City. Moreover, of the current petitioners, all but the Attorney General appear to have responsibilities only at Carson City, not the Ely facility. In light of this development and the absence of record evidence on key facts, the best course at this time would be to deny review and allow the district court to sort things out on remand from the court of appeals.

Thus, it would be premature for this Court to grant review when the case is far from over, the record is incomplete, McKinney's current situation is unclear, and the implications of the ruling below are theoretical at best.

2. Contrary to petitioners' assertions (at 11-20), the other appellate and trial court opinions are in harmony with the decision below to the extent that they have considered the Eighth Amendment issue posed here.

At the outset, petitioners err in claiming that the Ninth Circuit issued two conflicting opinions in the same month. *Johnson v. Moore*, 926 F.2d 921 (1991), which is said to conflict with the ruling here, is readily distinguishable because the authorities there responded to the prisoner's complaint of being double celled with a heavy smoker by moving him to another cell. Here, by contrast, McKinney is complaining that prison authorities did *not* respond to his objection about being celled with a prisoner who smoked five packs of cigarettes a day. Moreover, petitioners cited the alleged conflict with *Johnson* in their suggestion for rehearing *in banc*, but no Ninth Circuit judge asked for a vote on that suggestion. *See also Franklin v. State of Oregon*, 662 F.2d 1337, 1346-47 (9th Cir. 1981)(Eighth Amendment violation may be found if inmate suffering from throat cancer housed with cigarette smoker).

Nor does the decision here conflict with decisions in other circuits. Indeed, a panel of the Tenth Circuit reached the same conclusion in *Clemmons v. Bohannon*, 918 F.2d 858 (1990), although the opinion was vacated when that court voted to rehear the case *in banc*. *Id.* at 873 (argued February 1991). The other Tenth Circuit case petitioners cite, *Kensell v. State of Oklahoma*, 716 F.2d 1350 (1981), did not involve the Eighth Amendment. *Wilson v. Lynaugh*, 878 F.2d 846 (5th Cir. 1989), is also distinguishable because it involved a prisoner's effort to relitigate his 1980 defeat in a case challenging exposure to secondary cigarette smoke, and the focus of the opinion was on the res judicata issue.

Nor do the district court decisions cited by petitioners bolster the case for review. Some hold that an Eighth Amendment claim may be stated in some situations, *Beeson v. Johnson*, 668 F. Supp. 498 (E.D.N.C. 1987); *Avery v. Powell*, 695 F. Supp. 632 (D.N.H. 1988), while those reaching an opposite conclusion were properly distinguished by the court of appeals (Pet. App. A-44 n.3) on the ground that the complaints there asserted a more sweeping right to an utterly smoke-free environment. *Gorman v. Moody*, 710 F. Supp. 1256 (N.D. Ind. 1989); *Caldwell v. Quinlan*, 729 F. Supp. 4 (D.D.C.), *aff'd mem.*, 923 F.2d 200 (D.C. Cir. 1990), *pet. for cert. pending*, No. 90-7616. Another case was dismissed based on pleading deficiencies, *Lee v. Carlson*, 645 F. Supp. 1430 (S.D.N.Y. 1986), while in *West v. Wright*, *supra*, the court was "not called upon to determine whether the indefinite confinement of a nonsmoking prisoner against their will in a cell with a smoker implicates the Eighth Amendment" because it was "undisputed" that the prison authorities had "implemented significant safeguards for the protection of nonsmokers, including the opportunity to be assigned to a nonsmoking cell with a fan, output and input vents, and a window that may be opened." 747 F. Supp. at 332.

The recent decision in *Steading v. Thompson*, No. 90-2588 (7th Cir. 19 August 1991), also has no effect here. *Steading* is factually distinguishable because the prisoner there seemed to be seeking a smoke-free prison environment in the same manner as the prisoners in *Gorman* and *Caldwell*. Nor did he state a focused claim of the sort McKinney is making here, namely, that he was housed with a cellmate who smoked five packs of cigarettes a day and that prison officials refused to move him despite specific requests to do so.

Moreover, *Steading* appears to read the court of appeals' opinion in this case as depending on the proposition that "prison conditions may violate the eighth amendment even though the prisoner cannot establish that anyone devised those conditions (or permitted them to persist) in order to inflict punishment" (slip op. at 4). That proposition is said to conflict with *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), which clarified the culpable mental state that must be proven in order to establish an Eighth Amendment violation. As part 4 will discuss in more detail, however, there is no conflict between *Wilson* and the court of appeals' decision here because the district court will have to assess whatever evidence is submitted on remand in light of *Wilson*. And even if one were to assume, as does *Steading*, that a policy decision to allow smoking within a prison does not violate the Eighth Amendment, it does not follow, as a matter of law and without hearing evidence, that prison officials enjoy absolute freedom when, as here, a prisoner makes specific complaints about specific treatment which prison officials have refused to address.

3. Petitioners next argue (at 20-22) that this Court should grant review because Nevada enacted a law five months *after* the court of appeals' decision which indicates that facilities used to house or serve inmates are not subject to Nevada's law against smoking in public places. Without conceding the point, this change may have an effect on his statutory claim for injunctive relief with regard to the prison library (Pet. App. A-35), a point better left to full briefing in the district court. It does not, however, undermine the court of appeals' Eighth Amendment analysis, which is supported by the overwhelming thrust of legislation in the opposite direction, even in the context of prisoners and prison conditions (Pet. App. A-21-A-30). *See* pp. 3-4, *infra*.

Nor is review warranted on the theory that the court of appeals allegedly considered arguments not raised by the parties. Pet. at 23-26. The issue on appeal, as framed by McKinney, a *pro se* litigant in both lower courts, was whether the magistrate erred in directing a verdict in favor of petitioners. That issue reasonably embraces the question whether McKinney had stated an Eighth Amendment claim, including whether the magistrate was correct in viewing this issue in all-or-nothing terms.

Petitioners also claim (at 26) that the court of appeals unfairly deprived them of an opportunity to submit detailed briefs before it held that an Eighth Amendment claim may exist between the two extremes identified by the magistrate, claiming that they would have produced "evidence" on the difficulties they perceive in "classifying and housing inmates within the limitations of budget, facilities, and securities concerns." But appellate courts do not sit to receive evidence, and if anything, this claim argues against granting review. The court of appeals reversed a verdict that was directed in petitioners' favor at the close of McKinney's case. That ruling means that petitioners will, in fact, have an opportunity to introduce evidence on all factual issues that they deem relevant in the district court, which is best suited to receive such evidence and weigh it in the first instance.

4. Nor should the Court vacate the judgment below and remand for further consideration in light of *Wilson v. Seiter*, *supra*, which held that an inmate making an Eighth Amendment challenge to prison conditions must show that prison officials acted with "deliberate indifference," the standard set out in *Estelle v. Gamble*, 429 U.S. 29 (1976), for suits alleging a failure to provide adequate medical care. Pet. at 26-30. *Wilson* provides no basis to grant review or even remand this case because the Court in *Wilson* appeared to assume that the conditions being challenged could violate the Eighth Amendment, and the debate focused on whether prison officials had the requisite state of mind to establish that a violation had, in fact, occurred and exactly what that state of mind had to be. Here, the issue was precisely the opposite and focused on whether a prisoner who was an involuntary smoker could *ever* state an Eighth Amendment claim. And, of course, now that *Wilson* is the law, McKinney will have to prove "deliberate indifference" by the petitioners in order to prevail at trial.

Petitioners nonetheless argue that the "subjective" element in *Wilson* is not met here because McKinney failed to show that petitioners acted with the requisite intent to violate his Eighth Amendment rights. They cite that portion of the magistrate's opinion which dismissed McKinney's claim of inadequate medical care (*see* Pet. at 27-28; Pet. App. B-7-B-10), but that discussion is not germane here because it involves his *other* claim, which focused on petitioners' response to McKinney's current cold-like symptoms. No evidence was heard on his claim involving prison conditions (which is the subject of this petition) because the magistrate held, as a matter of law, that McKinney had failed to state a claim for relief, which ruling was overturned on appeal.

Questions about whether prison officials were deliberately indifferent to McKinney's present symptoms are distinct from questions about the health hazards which may be associated with any prison conditions which are found, as a factual matter and consistent with *Wilson*, to present an unreasonable risk to McKinney's health. Given the dearth of evidence on the latter claim, there is nothing in *Wilson* for the court of appeals to reconsider if the case were remanded for that purpose, and the proper remedy would still be remanding the case to the district court for fact finding.

Petitioners also contend (at 28-30) that the decision below violates an "objective" component of *Wilson* insofar as *Wilson* restated prior holdings of this Court as to what constitutes an Eighth Amendment violation. This argument merely restates petitioners' disagreement with the court of appeals' opinion and provides no basis for the Court to remand for further consideration.

Petitioners add (at 30) that McKinney made no showing that "his health or safety had been seriously threatened by exposure to secondary tobacco smoke," conveniently ignoring the fact that the magistrate did not hear evidence on that issue. They also object that the court of appeals acted "with undue haste in ruling for McKinney when [petitioners] had not even presented their own evidence to contest McKinney's legally insufficient facts." *Id.* But this proves our point. The court of appeals merely held that McKinney stated a claim which he and petitioners should litigate in the district court. Petitioners will have an ample opportunity to present evidence in that court, and no useful purpose would be served by directing the court of appeals to reconsider its holding in light of *Wilson*, when that issue will be fully considered by the district court in the first instance.

5. Nor is there any reason to review the second issue raised by this petition, *i.e.*, the court of appeals' interpretation of Rule 706, Federal Rules of Evidence. That Rule reads, in pertinent part, that compensation of experts appointed under that Rule "shall be paid by the parties in such proportion . . . as the court directs." On its face, the Rule contemplates that a trial court may allocate the costs entirely to one party or the other, the very result that petitioners complain of here. Apart from this lack of statutory basis for their rigid reading of the Rules, the only cases that petitioners cite (at 36-37) are consistent with the court of appeals' ruling here: Both apportioned costs in a way which recognized that one of the litigants was indigent. *Webster v. Sowders*, 846 F.2d 1032 (6th Cir. 1988); *United States Marshals Service v. Means*, 741 F.2d 1053 (8th Cir. 1984). Given the correctness of the ruling below, the absence of any conflict, and the lack of any suggestion that this is a serious problem requiring the Court's attention, the second question plainly does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1991

Attorneys for Respondent

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No. 91-269

In The

Supreme Court of the United States

October Term 1991

◆

DONALD L. HELLING, CAROL E. PLOYHAR,
JOHN V. IGNACIO, RONALD J.
ANGELONE, and CHARLES HORN,

Petitioners,

vs.

WILLIAM MCKINNEY,

Respondent.

◆

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

◆

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALASKA, ARKANSAS, FLORIDA, GUAM, IDAHO, ILLINOIS, KANSAS, LOUISIANA, MAINE, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VIRGINIA, WEST VIRGINIA AND WYOMING IN SUPPORT OF PETITIONERS

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No. 91-269

◆

In The

Supreme Court of the United States

October Term 1991

◆

DONALD L. HELLING, CAROL E. PLOYHAR,
JOHN V. IGNACIO, RONALD J.
ANGELONE, and CHARLES HORN,

Petitioners,

vs.

WILLIAM MCKINNEY,

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**Petition For A Writ Of Certiorari
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BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALASKA, ARKANSAS, FLORIDA, GUAM, IDAHO, ILLINOIS, KANSAS, LOUISIANA, MAINE, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VIRGINIA, WEST VIRGINIA AND WYOMING IN SUPPORT OF PETITIONERS

◆

The amici States enumerated above, by their respective Attorneys General, submit this brief in support of the petition for certiorari to the United States Court of Appeals for the Ninth Circuit filed by the Attorney General of Nevada from the judgment entered in the proceeding below on February 1, 1991.

◆

INTEREST OF THE AMICI CURIAE

This Court has recognized that "[p]rison administrators [] should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish,* 441 U.S. 520, 547 (1979). The amici States, therefore, have a significant interest in seeing that their administrative discretion to manage and operate their prison and jail facilities in the most efficient and effective manner consistent with legitimate security concerns not be unduly hampered by court-imposed orders requiring them to either ban smoking completely in prison or segregate prisoners according to their smoking or non-smoking preferences. Serious security problems could arise under either scenario, as a complete ban would physically and psychologically disturb many smoking prisoners, making them more prone to violent behavior, while attempting to segregate inmates according to smoking status could require ignoring important security concerns in assigning detainees to various cells.

Furthermore, the amici States have a very significant interest in holding down the immense costs of building and operating prisons and jails within their states. The decision below, if allowed to stand, would likely lead to even greater drains on State treasuries as segregating prisoners according to their smoking preferences would require either new prison facilities or extensive renovations. A complete ban on smoking, on the other hand, would require more medical personnel to treat addicted smokers suffering withdrawal symptoms and/or more prison guards to deal with the likely increase in prison unrest.

◆

SUMMARY OF THE ARGUMENT

This Court should grant the writ of certiorari in this case because the decision below determined a significant issue of Federal Constitutional law that has not been decided by this Court, and will have a severe impact upon the States' financial status, prison administration and security, and the welfare of the prisoners themselves. Furthermore, the ruling below is in direct conflict with numerous decisions of other Federal Courts of Appeals rejecting identical or similar cruel and unusual punishment claims. Most significantly, the Ninth Circuit's decision plainly violates this Court's recent ruling in *Wilson v. Seiter,* 59 U.S.L.W. 4671, 4673 (U.S. June 17, 1991), by failing to even address the requirement of "deliberate indifference," and because plaintiff failed to establish such deliberate indifference in any event. Finally, the Ninth Circuit's separate decision holding that the Nevada anti-smoking statute creates a liberty interest in smoke-free prison libraries protected by the Due Process Clause unjustifiably expands *substantive* due process protection to interests created solely by State law.

◆

ARGUMENT

I. The Issue of Whether the Cruel and Unusual Punishment Clause Requires Prison Administrators to Accommodate the Smoke-free Air Preferences of Non-smoking Inmates Raises an Extremely Important Question of Federal Constitutional Law that Has Not Been but Should be Decided by this Court.

As just described above, the impact of the decision below on the fiscal solvency of the states and the security of their prison facilities is potentially very severe. Because the proportion of smokers in prisons nationwide is around 90%, *see* N.Y. Times, July 9, 1990 at A10, col. 5, virtually all prisons across the country will be faced with major institutional and/or economic crises if nonsmoking prisoners can demand smoke-free, or less smoky, air. For this reason alone, putting aside the important constitutional question, certiorari should be granted to review a decision having such potentially devastating consequences.

The constitutional question of whether it is cruel and unusual punishment to subject prisoners to levels of cigarette smoke that cause them no immediate or short-term ill effects, on the ground that it might endanger their health at some unspecified point in the future, is an important one that has not been addressed by this Court. In light of the 90% smoking rate among inmates, thousands of non-smoking inmates are potentially being subjected to significant levels of second-hand tobacco smoke and thus they, too, have an interest in having this question resolved finally by this Court. Indeed, *all* prisoners will be greatly affected by resolution of this important issue, as a ruling upholding the decision below could lead to smoking bans which would be stressful and disturbing to the majority smoking inmates, and which not inconceivably could raise its own cruel and unusual punishment questions.

In short, certiorari should be granted so that this Court can resolve a constitutional problem that is currently having, and will continue to have, a most severe impact upon state fiscal responsibility, prison security, and the welfare of the prisoners themselves.

II. The Ruling Below is in Conflict with Decisions of other Courts of Appeals.

The decision below is in direct and irreconcilable conflict with a decision issued just three weeks ago by the United States Court of Appeals for the Seventh Circuit in *Steading v. Thompson,* No. 90-2588 (7th Cir. August 19, 1991). Judge Easterbrook, writing for a unanimous court, rejected a prisoner's claim that his forced exposure to second-hand tobacco smoke in prison violates the Cruel and Unusual Punishment Clause because the plaintiff had failed to establish that the prison officials intended the passive smoke as punishment to him.

Because McKinney brought forth no evidence to suggest that the Nevada prison officials intended his exposure to second-hand smoke, along with its potentially deleterious health effects, as punishment, the Seventh Circuit, in light of its ruling in *Steading,* would clearly have reached the opposite result in the case at bar.

Other Courts of Appeals have also reached decisions that conflict, in varying degrees, with the ruling below. In *Wilson v. Lynaugh,* 878 F.2d 846 (5th Cir. 1989), the Fifth Circuit Court of Appeals rejected a prisoner's claim that forced passive exposure to cigarette smoke in prison was cruel and unusual punishment. Although relying primarily on res judicata principles (plaintiff having already lost an earlier similar claim), the Court concluded that "evolving standards of decency that mark the progress of a maturing society," *Rhodes v. Chapman,* 452 U.S. 337, 346 (1981), had not yet reached the point of condemning forced exposure to second-hand smoke. 878 F.2d at 851.

The United States Court of Appeals for the District of Columbia Circuit affirmed, without opinion, the District Court decision in *Caldwell v. Quinlan,* 729 F. Supp. 4 (D.D.C.), *aff'd,* 923 F.2d 200 (D.C. Cir. 1990), rejecting an inmate's claim of cruel and unusual punishment based upon his forced exposure to second-hand smoke in prison. The District Court essentially reasoned that "standards of decency" had not yet evolved to the point of forbidding forced prisoner exposure to passive smoke. 729 F. Supp. at 6-7.

There is also substantial Federal *District* Court precedent rejecting the position taken by the Ninth Circuit below. *See, e.g., Gorman v. Moody,* 710 F. Supp. 1256 (N.D. Ind. 1989) (rejecting prisoner's claim that his forced exposure to second-hand smoke is cruel and unusual punishment).

This Court, therefore, should grant the petition for certiorari for the additional purpose of resolving the conflict among the different federal circuits.

III. The Ruling Below Violates the Express Holding of this Court's Recent Eighth Amendment Decision in *Wilson v. Seiter* by Failing to even Address the Requirement of "Deliberate Indifference" and because Plaintiff Failed to Establish such Deliberate Indifference.

This Court decided just last term that in order for conditions of confinement in a prison to constitute cruel and unusual punishment, the plaintiff must establish, in addition to the objective element of a sufficiently serious harm, a subjective element, namely, that the prison officials were "deliberately indifferent" to the harm caused the inmate. *Wilson v. Seiter*, 59 U.S.L.W. 4671, 4673 (U.S. June 17, 1991). The Ninth Circuit's decision plainly violated *Seiter*'s mandate in two ways.

First, the Ninth Circuit did not even address the subjective component of "deliberate indifference" as applied to its main holding that forced exposure to levels of passive smoke that pose an unreasonable risk of future harm to an inmate's health violates the Eighth Amendment.[1] The Court, in direct violation of *Wilson v. Seiter*, simply ignored that requirement and instead analyzed only the objective question of the seriousness of the harm. For this reason alone, and given that *Seiter* was not decided until after the Ninth Circuit's decision came down, this Court should, at the very least, grant certiorari, vacate the Ninth Circuit's decision, and remand to the Ninth Circuit for reconsideration in light of *Wilson v. Seiter*. This will ensure that lower federal courts follow this Court's explicit mandate in *Seiter* that "deliberate indifference" is a prerequisite to finding an Eighth Amendment violation.

Second, this court should in fact *reverse* the Ninth Circuit's ruling because the plaintiff clearly failed to establish the requisite "deliberate indifference." Although there was evidence that the prison officials were made aware of McKinney's complaint about exposure to passive smoke and did not take any steps that succeeded in reducing McKinney's exposure, there was no evidence presented that the prison officials knew or should have known that second-hand smoke poses a serious health hazard. Indeed, whether passive smoking is a serious health threat is to this day a hotly debated subject. Although the Surgeon General's Report of 1986 does suggest that exposure to second-hand smoke creates such a danger, there was no evidence presented that the Nevada prison officials were even aware of that report, or had reason to believe that Report's conclusions as opposed to the findings of other studies disputing the harm caused by passive smoke.

---

[1] The Ninth Circuit only addressed the requirement of "deliberate indifference" as to McKinney's very separate Eighth Amendment claim that the second-hand smoke was aggravating his *existing* medical symptoms, as opposed to his claim regarding the as-yet-unrealized risk of *future* harm. *See McKinney v. Anderson*, 924 F.2d 1500, 1511 & n.33 (9th Cir. 1991).

Without evidence of knowledge by Nevada officials of the hazards of second-hand smoke, it simply cannot be said that those officials were deliberately indifferent to McKinney's health. Nevada officials, by not taking steps to reduce or eliminate McKinney's exposure to passive smoke, were at best deliberately indifferent to his desire to be *free of passive smoke exposure*, which, absent any knowledge on their part that such exposure is dangerous to his health, does not constitute deliberate indifference to his *health*.

Therefore, given plaintiff's complete evidentiary failure to satisfy *Seiter*'s express requirement of a showing of "deliberate indifference," this Court should grant certiorari, and reverse the judgment below, to the extent it allowed plaintiff to proceed on his Eighth Amendment claim.

IV. The Ninth Circuit's Holding that Nevada's Anti-Smoking Statute Creates a Liberty Interest Protected by the Due Process Clause is Dependent Upon the Doubtful Proposition that Substantive Due Process Rights Can be Derived from State Law.

The Ninth Circuit, in addition to its Eighth Amendment ruling, held that the Nevada anti-smoking statute, limiting smoking in certain specific public places, applied to prison libraries and therefore created a liberty interest in smoke-free prison libraries that is protected by the Due Process Clause. However, this Court has refused to recognize *substantive* due process protection for interests created by state law. In *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 222-23 (1985), this Court assumed, *without deciding*, that a particular substantive due process right, allegedly arising out of state law, existed, and instead rejected the claim on its merits. Most significantly, however, Justice Powell, in his concurring opinion, concluded that:

> While property interests are protected by *procedural* due process even though the interest is derived from state law rather than the Constitution, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), *substantive* due process rights are created only by the Constitution.

Ewing, 474 U.S. at 229 (Powell, J., concurring) (emphasis added). This position was not refuted by the majority opinion.

Therefore, because the Ninth Circuit's Due Process holding depends upon the dubious proposition, in light of *Ewing*, that State law can create liberty interests protected by *substantive* due process, this Court should grant certiorari to reject such an unwarranted expansion of substantive due process that threatens to turn the Constitution into a "font of tort law." *Paul v. Davis,* 424 U.S. 693, 701 (1976).

◆

CONCLUSION

For the foregoing reasons, the amici States respectfully request that this Court grant the petition for writ of certiorari filed by the Attorney General of Nevada, and reverse the judgment below to the extent it allowed plaintiff to proceed on his Eighth Amendment and Due Process claims. As an alternative to *reversing* the judgment on the Eighth Amendment claim, this Court should at least grant certiorari and *vacate* the judgment on the Eighth Amendment claim, and remand for reconsideration in light of *Wilson v. Seiter.*

Dated: Honolulu, Hawaii, September 9, 1991.

Respectfully submitted,

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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II.

ARGUMENT

Petitioners respectfully submit that the arguments in the Respondent's Brief in Opposition are flawed, and, albeit inadvertently, underscore the necessity for guidance from this Court on whether an inmate states an Eighth Amendment claim by alleging involuntary exposure to environmental tobacco smoke (ETS).

Petitioners will reply to the respondent's reasons for denying the writ in the numerical order presented in the Brief in Opposition, pages 5 through 12.

1. Respondent argues that since the Ninth Circuit Court of Appeals has already decided that exposure to ETS poses an unreasonable health risk for which an inmate may state an Eighth Amendment claim, it is now merely left to the district courts to wrestle with the details of deciding what is unreasonable

and what remedies are appropriate. This begs the question, which is whether the Ninth Circuit properly held that an inmate's exposure to ETS states an Eighth Amendment claim.

Secondly, it is not simply the decision of the Ninth Circuit which has created uncertainty for states and prison administrators nationwide. As amply demonstrated in the Petition, and in the Brief Amici Curiae, recent decisions in the Fifth, Seventh, Ninth and Tenth Circuits, and in at least six district courts, have resulted in conflicting results on this question. There is a strong need for uniformity and for resolution of this issue to prevent years of expensive and time-consuming litigation.

Respondent purports to know that the Ninth Circuit's ruling will have no adverse or costly effect on prison systems, presumably on the grounds that some prison systems "have taken steps to separate non-smoking prisoners from cigarette smokers." Petitioners respectfully suggest the majority of states already do what they can, given the constraints under which they operate, to accommodate both smokers and non-smokers. Nonetheless, lawsuits continue to be filed by smokers *and* non-smokers, and state officials and prison administrators are justifiably concerned with the potential impact of having to either completely eliminate smoking or expand facilities to accommodate both factions.

Respondent asserts that because he is presently housed in a different prison within the State of Nevada than when the lawsuit was initiated, that more fact-finding is needed before the Court considers this issue. But regardless of where he is now housed, he is within the Nevada Department of Prisons system, subject to being transferred to any of its prisons, and still subject to all its rules and regulations, including those concerning smoking and non-smoking areas.

2. Respondent attempts to convince this Court that all the circuit court and district court opinions cited by Petitioners and by Amici Curiae are actually in harmony with each other, and easily distinguished from this action. Petitioners disagree.

The two recently-decided Ninth Circuit opinions, McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991), and Johnson v. Moore, 926 F.2d 921 (9th Cir. 1991), are in conflict because the former holds that a mere allegation of exposure to "unreasonable" levels of ETS is sufficient to state an Eighth Amendment claim, even in the absence of medical problems. In contrast, the Ninth Circuit panel deciding Johnson held there was no deliberate indifference to Johnson's serious medical needs, due to "...a lack of medical substantiation for his claimed allergy." That panel noted that, in any event, prison officials did accommodate Johnson's request to be in a single cell.

It is difficult to comprehend Respondent's insistence that there is no conflict between McKinney and the recently decided case of Steading v. Thompson, 1991 WL 158070 (7th Cir. (Ill.)), 60 U.S.L.W. 2148. In the wake of Wilson v. Seiter, 111 S.Ct. 2321 (1991), the Steading court clearly rejected the proposition relied on by the Ninth Circuit in McKinney that an Eighth Amendment violation may be stated even where the inmate cannot show the complained-of conditions were permitted to exist as punishment. In addition, respondent's claim at the district court level was just as "focused" as the prisoner in Steading, because in both cases the inmate sought to establish a right to a smoke-free environment.

Respondent's perception that all the cases cited in the Petition are either distinguishable or in harmony is not well taken. Although there are certainly some factual distinctions among them, this does not automatically render them irrelevant to this case. For example, respondent states that Kensell v. State of Oklahoma, 716 F.2d 1350 (10th Cir. 1983) which concerned a state employee's claim of a right to a smoke-free work environment, is not an Eighth Amendment case. But the rationale in Kensell is relevant, and the circuit court in Clemmons v. Bohannon, 918 F.2d 858 (10th Cir. 1990) reh'g. granted Nov. 14, 1990, discussed Kensell in explaining its own decision.

Similarly, in Wilson v. Lynaugh, 878 F.2d 846, 851 (5th Cir. 1989), the Court decided the res judicata issue at least in part upon its observation that there had not been any intervening change in law regarding non-smokers rights to trigger an exception to the res judicata rule.

McKinney argues there is no conflict between Wilson and the instant case "because the district court will have to assess whatever evidence is submitted on remand in light of Wilson." This assumes there will be a retrial, which is not at all certain. The Ninth Circuit reversed and remanded McKinney's claim "...for further equitable proceedings, including a trial, if necessary..." (Pet.App. A-42). In any event, an eventual retrial would do nothing to resolve the conflicts among the circuits and district courts, and would only serve to delay consideration of this issue.

3. The Ninth Circuit, in support of its decision that inmates' exposure to environmental tobacco smoke could violate the Eighth Amendment, reasoned that the evolving standard of decency in our society today may be determined by examining recent state and federal legislation. (Pet. App. A-25-A-29). The Court placed heavy emphasis on state statutes regulating smoking in public places. Petitioners respectfully refer this Court, however, to Judge Tacha's dissent in Clemmons v. Bohannon, supra, at p. 872:

> ...a review of the state legislation cited by the majority as forbidding or restricting smoking reveals that the vast majority of these laws are limited to public places, which are statutorily defined so as to exclude prisons. [footnote 1]. Thus, although society's attitude as indicated by the objective factor of state legislation shows a trend toward protecting the rights of nonsmokers in public places, society

> has expressly rejected extending these protections to prisons and nonsmoking prisoners...
>
> The fundamental error of the majority's approach lies in the presumption that it is the duty of the courts to spearhead society's evolving standard of decency. Rather, the Supreme Court has emphasized that it is our duty to apply society's standard even though the standard may be "restrictive and even harsh." [citing Rhodes v. Chapman, 452 U.S. 337, 347 (1981)]

[Note: To date, no decision has been issued following rehearing in Clemmons.]

In 1991, Nevada's state legislature chose to make it clear that Nevada's laws restricting smoking in certain public places do not apply to its prison facilities. This is a strong indicator that the Ninth Circuit's perception of the present standard of evolving decency may be erroneous.

Respondent argues the issue on appeal before the Ninth Circuit "reasonably embrace[d] the question whether McKinney had stated an Eighth

Amendment claim, including whether the magistrate was correct in viewing this issue in all-or-nothing terms." Petitioners disagree. At trial, pursuant to the pretrial order agreed to between defendants (Petitioners) and respondent, respondent argued that he had serious medical needs which were ignored by defendants, and, that he had a right to a smoke-free environment. The U.S. Magistrate, on a motion for directed verdict, found he had failed to show either a serious medical need or that any of his medical needs had been ignored, and, under existing law, respondent had no right to a smoke-free environment. (Pet.App. B). The question on appeal was not whether case law should be changed, but whether the U.S. Magistrate abused her discretion in granting petitioners' motion for a directed verdict. McKinney did not show, nor did the Ninth Circuit rule, that there was any abuse of discretion.

4. Respondent argues that Wilson v. Seiter, 111 S.Ct. 3221 (1991) does not and should not affect this case.

Clearly, respondent wishes to escape a review of his claim under the guidelines of Wilson. He asserts that because Wilson assumed an Eighth Amendment claim was stated, Wilson's requirements could not be applied to a case, such as respondent's, where the issue is whether a claim has been stated in the first place. Petitioners respectfully suggest that application of Wilson is not precluded simply because a case involves another issue to be determined.

Petitioners disagree with respondent's characterization of the U.S. Magistrate's order as addressing petitioners' state of mind with respect to the claim of inadequate medical care only. As to that specific issue, the U.S. Magistrate held:

> Such testimony completely fails to establish deliberate indifference to serious medical needs. Nor does such testimony provide that the acts of the Defendants were the proximate cause of any injuries the Plaintiff might have sustained. (Pet.App. B-8)

But the U.S. Magistrate also made the following finding:

> There was no evidence presented of personal involvement by any of the Defendants, nor in accordance with the test announced in Beeson above, was there any indication that any of the Defendants intentionally chose to inflict harm upon the Plaintiff. (Pet.App. B-10)

Thus, regardless of whether the claim was considered in the context of a claim of deliberate indifference to serious medical needs or a claim against an alleged unconstitutional condition, there was a specific determination that none of the defendants (petitioners herein) acted with the intent required to prevail under Wilson.

Respondent makes several arguments based on his complaint there is insufficient evidence in the record because the U.S. Magistrate did not hear evidence on specific issues. But whether the U.S. Magistrate's rulings on evidence offered by respondent were proper is not an issue on appeal. Respondent already had his day in court, and presented evidence which supposedly supported his case. If, in respondent's opinion, the record contains "insufficient evidence," he has only himself to blame.

Finally, Petitioners submit that the issue of whether inmates' exposure to environmental tobacco smoke meets the objective component of Wilson is ripe for consideration by this Court. States are faced with civil rights lawsuits from both smokers and non-smokers. See, e.g., California Men's Colony v. Rowland, et al., 939 F.2d 854 (9th Cir. 1991) (prisoners' "association" brought suit to require prison administrators to resume discontinued practice of providing free tobacco to indigent inmates). Prison officials are justifiably concerned about their ability to effectively and safely classify, house and manage full prison populations. State administrators are concerned about the fiscal impact which adverse rulings may have. (See Brief Amici Curiae).

In society today, people outside prison walls are exposed to environmental tobacco smoke (often involuntarily) in many places, with statutory exceptions primarily directed at enclosed public places. Citizens may very well be at much higher risk for all kinds of damage to their health than those who are incarcerated. Most people will risk a potential traffic accident because the ability to get to work, to school, or to one's home with reasonable speed and efficiency is of more immediate importance. In a prison setting, it is far more immediately important to be able to separate dangerous inmates such as warring gang members and to avoid the risk of violence, rather than to ensure that all smokers and non-smokers are kept apart.

Exposure of non-incarcerated persons to environmental tobacco smoke is not, in our society, considered cruel and unusual, even though it may be offensive and a potential health hazard. Likewise, this Court should decide that exposure to environmental tobacco smoke, in the absence of an existing serious medical need, is not cruel and unusual punishment in a prison.

5. Petitioners respectfully disagree with Respondent as to the need

for a ruling on the Ninth Circuit's interpretation of Rule 706 of the Federal Rules of Evidence. It is a matter of common knowledge and concern that the workload of the federal courts with respect to inmate civil rights cases continues to multiply at an alarming rate. This situation likewise affects the financial resources and staffing requirements of state prisons, state attorney general offices, and courts. Expert witness costs and fees are often the most expensive part of a lawsuit. Now the Ninth Circuit, without caveat or restriction, has essentially allowed indigent litigants to petition the courts with motions seeking orders to force the states and other "deep pocket" governmental entities to pay the entire cost of inmate litigants' expert witnesses. Petitioners respectfully suggest this is a situation which neither the federal court nor most states can afford.

III.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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